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CASE AND COMMENT

TRIBUNALS AND INQUIRIES ACT, 1958

THE Tribunals and Inquiries Act, 1958, was described by the Home Secretary as " a notable addition to the long series of measures, stemming from Magna Carta and the Bill of Rights, which preserve our individual liberties." It is, indeed, a milestone, for it marks the first real step towards applying general standards of procedure, based on ideals cherished in the traditional courts of law, to decisions taken by administrative tribunals and by Ministers which, according to the official view expressed before the Franks Committee, were merely part of the business of administration. The Committee's Report (1957, Cmnd. 218) stressed the opposite view, that " administrative " tribunals were really part of the machinery of justice, and that much needed to be done to knit them into an orderly system, based on sound general principles, particularly as to procedure. The Committee recommended a new body—the Council on Tribunals—which the Act now constitutes, and which is to consider how certain of the Committee's conclusions can be carried into effect. Although it has emerged in the Act as a purely advisory body, it may be looked back to in future times as the first experimental move towards regulating the disputed territory between the legal and administrative worlds which in some other countries is the province of Councils of State.

Lord Reading did not exaggerate in saying that the government had acted with sputnik-like speed in accepting the great majority of the Committee's recommendations. Legislation has followed at an equally startling (and gratifying) pace, and the welcome given to the Bill from both sides of both Houses of Parliament surely puts it beyond question that the time for these changes was ripe. The political impetus came, illogically, from the case of Crichel Down in

1954 (Cmd. 9176)—for although what one might venture to call "routine maladministration" was outside the terms of reference of the Franks Committee, the storm over that case touched off a large accumulation of discontents connected with the more formal proceedings of tribunals and public inquiries, and it was these that the Committee was asked to consider. The Act, modelled as it is upon the Committee's Report, does not quite strike at the root of the problem of administrative justice, which is first to determine in what cases the citizen has a right to a hearing at all. It seems, unfortunately, that this question can no longer safely be left to the courts of law; and it is interesting to see that it was touched upon by two speakers in the House of Commons, Mr. Fletcher-Cooke and Mr. Weitzman. But where there is already a statutory right to a hearing, either before a statutory tribunal or before a departmental inspector, the Act sets out to make that hearing a better one by improving its real and apparent fairness in every way consistent with efficiency. The primary instrument of this policy is to be the new Council, which is to keep under review the constitution and working of the principal tribunals and is also to report on any special problems connected with inquiries. Contrary to the Committee's intentions, the Council will have no executive power: it will only advise. But there will be the corresponding advantage that it will be all the more independent, and will be free from the trammels of political responsibility. Its great merit is that it will be permanent, so that complaints can be dealt with as they arise, and methodical work can be put in hand for weaving all the various *ad hoc* tribunals into something like a coherent scheme of administrative justice. No longer therefore need grievances be pent up until, every twenty-five years or so, they reach flash point and a special committee is set up which, having reported, dissolves.

This Act, prompt though it is, is not the first of the steps taken to implement the Franks Report. Some of the recommendations concerning tribunals, and many of those concerning inquiries, can be carried out by changes in departmental practice, without legislation. Important circulars have been issued (conveniently summarised in *Public Law*, 1958, pp. 186, 294, 295) which provide, for example, for permitting legal representation before National Insurance Local Tribunals, for making Local Valuation Courts appear more independent of local authorities, for making available information about the official case before and during public inquiries, for giving reasoned decisions, and for publishing inspectors' reports. Another group of reforms—for example, a code of procedure for tribunals, and legislation as to planning appeals—lies in the future,

for there are many such matters which will need detailed legislation and which will not be ready for action until the Council on Tribunals has studied them. It is also clear that some of the reforms already effected administratively will in due course be firmly entrenched by Act of Parliament. In the House of Commons several speakers objected to leaving important safeguards to rest merely upon departmental practice, and the Home Secretary said, as regards inquiries, that the procedural rules to be framed by the Council would eventually be made statutory, notwithstanding what had already been done by circular. This Act is thus intended to pave the way for others.

The Act certainly resembles Magna Carta and the Bill of Rights in one respect: it is a bundle of heterogeneous provisions aimed at practical problems. Section 1 constitutes the Council on Tribunals, which is to have at least ten and not more than fifteen members appointed by the Lord Chancellor and the Secretary of State for Scotland. There will thus be one Council for the whole of Great Britain, rather than the separate English and Scottish Councils which the Franks Committee recommended; but there is special provision in the Act (s. 1 (3)) for a Scottish Committee of the Council, which in case of difference with the English members may report direct to the Secretary of State (s. 2 (6)). The Council's primary functions are laid down in section 1 (1) and are (a) "to keep under review the constitution and working of the tribunals specified in the First Schedule to this Act" (which correspond to the tribunals considered by the Franks Committee), (b) "to consider and report on such particular matters as may be referred to the Council under this Act with respect to tribunals other than the ordinary courts of law" (whether or not scheduled), and (c) "to consider and report on such matters as may be referred as aforesaid, or as the Council may determine to be of special importance" concerning statutory inquiries. In the original Bill the Council was not given this latter power to put things on its own agenda with respect to inquiries, but the amendment was introduced by the Lord Chancellor in the House of Lords. He claimed, with justice, that the Council's scope was then even wider than the Franks Committee had recommended, for the Committee confined themselves to inquiries dealing with land (though adding that the same principles should apply elsewhere) and did not specifically charge the Council with any other task in connection with inquiries than formulating a code of procedure—although the general tenor of the report is wholly in favour of the wider jurisdiction now granted by the Act. Furthermore, the Council is to make an annual report on its own proceedings, which the Ministers concerned are to lay

before Parliament (s. 2 (7)). It is also to be consulted before procedural rules are made for any of the scheduled tribunals (s. 8). Future tribunals are not within the Council's purview until the Lord Chancellor and Secretary of State make an order under section 10. No doubt it is intended that this shall be done in all suitable cases, but nevertheless the Council's position, looked at formally, is in this respect somewhat precarious.

Sections 3 and 4 deal with the appointment of chairmen and members of tribunals respectively. This is the principal matter in which the Government have felt unable to meet the wishes of the Committee in full, and it was upon this that parliamentary criticism was chiefly centred. The Committee recommended that chairmen should be appointed by the Lord Chancellor and members by the Council itself. The Act provides that chairmen shall be appointed by Ministers (as at present) but from panels nominated by the Lord Chancellor; and that the Council may make *general* recommendations as to the membership of tribunals or panels and that " the appropriate Minister shall have regard " to such recommendations. It was no doubt inevitable that the Council itself should not be permitted to make appointments, for there are objections to giving it executive functions, and even in the courts of law themselves the judges are appointed on the specific advice of the Lord Chancellor or of the Prime Minister. Perhaps, furthermore, it makes little real difference whether appointments are made by Ministers with the concurrence of the Lord Chancellor or by the Lord Chancellor with the concurrence of Ministers. As to the appointment of inspectors to hold inquiries the Act is silent. The Committee wished the main body of inspectors to be placed under the control of the Lord Chancellor, so as to appear to detach them from the influence of " the appropriate Minister," except in Scotland where there is already an enlightened practice of employing independent members of the legal profession. In the parliamentary debates there was a persistent demand that the English inspectors should be " Lord Chancellor's men," and Lord Lucas moved an amendment that inspectors, like chairmen of tribunals, should at least be appointed from Lord Chancellor's panels. The Government here felt obliged to maintain the *status quo*, saying that with some 100 inspectors holding some 6,000 inquiries a year it was essential that they should remain an integral part of the organisation within their own Ministries. But the last has certainly not been heard of this difficult problem. Meanwhile the Act (s. 7) does transfer one class of appointments to the Lord Chancellor: that of General Commissioners of Income Tax, whose former property qualification is also abolished.

Section 9 provides for appeals on points of law to the High Court—and thence upwards, a clause barring appeals to the House of Lords having been dropped. Notable among the tribunals to which it applies are rent tribunals, which were attacked before the Franks Committee on many grounds, not least because they were courts of no appeal. A cognate section of particular interest is section 11, which prevents "judge-proof" clauses in existing statutes from impeding the jurisdiction of the High Court by way of certiorari and mandamus. Orders which are "not to be called in question in any court" are therefore now made questionable by certiorari, and that is an important gain. The sting of the section, however, is in its tail, for its final words except cases where there is a time limit for application to the High Court, as for example the very short limit of six weeks under the Acquisition of Land (Authorisation Procedure) Act, 1946. A case such as *Smith* v. *East Elloe R. D. C.* [1956] A.C. 736 will therefore not be affected.

In response to the widespread feeling that the Act ought to say something about giving reasons for decisions, the Government introduced a new clause in the House of Commons which now stands in the Act as section 12. This requires reasons to be given for decisions both by tribunals and by Ministers after statutory inquiries. The statement of reasons may be either written or oral, and it need be made only if requested. Nevertheless this section puts the duty to give reasons higher than in the courts of law, for in the courts the judges have no statutory duty to give reasons, and occasionally they do not do so; when trying questions of fact, of course, they hardly ever do so. Section 12 is subject to some limitations: reasons may be refused on grounds of national security, and they need not be given for orders "of a legislative and not an executive character"—a provision which may some day cause the courts to try to distinguish these two different but indefinable functions. There is also provision for future exceptions, after consultation with the Council, if it appears in any class of case that reasoned decisions are unnecessary or impracticable. But lawyers will welcome the express provision (subs. (3)) that reasons when given shall form part of the decision and be incorporated in the record. This will produce "speaking orders," and will meet the complaint so often voiced since *R.* v. *Northumberland Compensation Appeal Tribunal* [1951] 1 K.B. 711, that though certiorari will lie to review errors of law on the face of the record, the record may not contain the reasoning which would make the error plain on its face. If *oral* reasons are ever in fact challenged, the record containing them will be something of a curiosity.

Conspicuous by its absence from the Act is any provision for appeals on merits, as distinct from appeals on points of law. The Franks Committee recommended that there should be an appeal "on fact, law and merits" from a tribunal of first instance to an appellate tribunal, except where the tribunal of first instance is exceptionally strong. The Committee certainly intended, for example, that there should be appeals on merits from rent tribunals. To constitute various appellate tribunals will require detailed legislation and will probably also provide work for the Council, so that this omission from the Act is readily understandable. But hardly anything was said on this subject in the debates, and it ought not to pass out of sight.

H. W. R. WADE.

CONSTITUTIONAL LAW—PARLIAMENTARY PRIVILEGE

THE circumstances which surround the Special Reference to the Judicial Committee of the Privy Council, *Re Parliamentary Privilege Act* [1958] A.C. 331, have been fully reported in the national press. Under section 4 of the Judicial Committee Act, 1833, the Crown has power to refer matters to the Judicial Committee and so obtain an authoritative legal opinion. The part played by the reference in this case was a narrow one because the Committee of Privileges of the House of Commons only recommended for the consideration of the Judicial Committee the question of law "whether the House of Commons would be acting contrary to the Parliamentary Privilege Act, 1770, if it treated the issue of a writ against a Member of Parliament in respect of a speech or proceeding by him in Parliament as a breach of its privileges." The Judicial Committee found that the Act, which was the last of a series of similar Acts enacted between 1700 and 1770, applied only to proceedings against Members of Parliament in respect of their debts and actions as individuals. It did not abridge or affect the privilege of freedom of speech in Parliament and had no application in respect of conduct by Members in Parliament itself.

The Judicial Committee expressed no opinion on the finding of the Committee of Privileges that a letter written by a Member of the Opposition to the Paymaster-General was a "proceeding in Parliament" within the meaning of the Bill of Rights, 1688, and so entitled to absolute privilege. The letter in question criticised the methods of the London Electricity Board, a unit of the nationalised electricity industry, in disposing of certain scrap material. It will be recalled that the issue came before the Committee of Privileges when the London Electricity Board threatened through their

solicitors to institute proceedings for libel against the Member in respect of statements made by him in the letter. After the Committee of Privileges had considered the report of the Judicial Committee they repeated their initial finding that the writing of the letter was a proceeding in Parliament within the meaning of the Bill of Rights, but recommended to the House that in the special circumstances of the case, which was the first of its kind, no further action should be taken against the London Electricity Board or its solicitors. When this further report from the Committee of Privileges came before the House of Commons on July 8, 1958 (591 H.C.Deb. cols. 208 *et seq.*), the House on a free vote decided by 218 to 213 to disagree with the Committee and accordingly to reject the finding that such a letter was a breach of privilege. Had the recommendation of the Committee of Privileges been accepted it would still have been open to the High Court to find that the issue of a writ in the circumstances of the case was not an infringement of the provision of the Bill of Rights and the way would have been opened to another clash between the House of Commons and the courts on the lines of the classical illustration afforded by *Stockdale* v. *Hansard* (1839) 9 Ad. & E. 1, and the *Sheriff of Middlesex' Case* (1840) 11 Ad. & E. 273. These cases, it will be recalled, led to the imprisonment by the House not only of a party who was held guilty of breach of privilege merely for exercising his legal rights, but also of his solicitor and the sheriff who executed the judgment of the court in his favour.

There is no doubt that communications between Members and Ministers on any subject are already treated by the courts as privileged as regards the law of libel provided that they are written in good faith. It is therefore difficult to see the force of the minority view in the House of Commons, which is equally that of the Committee of Privileges, that such communications should enjoy absolute, as distinct from qualified, privilege. When matters are raised by questions or by motion in the House itself Members must substantiate any charges which they choose to make and they will be contradicted in public if they are false. But a person who considered himself libelled in a letter written by a Member to a Minister would normally be without any opportunity of vindication if such letters were covered by the absolute privilege of Parliament.

E. C. S. Wade.

ADMINISTRATIVE LAW—DECLARATION—CERTIORARI

In *Pyx Granite Co. Ltd.* v. *Ministry of Housing and Local Government* [1958] 1 Q.B. 554, which dealt primarily with the complex

question—when in town and country planning law is a development not a development—the members of the Court of Appeal were unable to agree on the scope of the remedies by declaration and certiorari. The plaintiff company was seeking to establish that development which they proposed to carry out on their land in the Malvern Hills was authorised by the Malvern Hills Act, 1924, and that accordingly two decisions varying works authorised by the Act made by the Minister in the exercise of his powers under the Town and Country Planning Act, 1947, s. 14, were of no effect. The Minister challenged the jurisdiction of the court to grant the declaration sought, arguing that the decision of the Minister under the Act of 1947 on an application to determine whether permission to develop was required "shall be final," and further that the Minister's discretion under the section was so wide as to disentitle the plaintiff company from asking the court for a declaration that conditions imposed by the Minister were invalid. The majority of the Court of Appeal (Lord Denning and Morris L.J.) held that there was nothing in the Town and Country Planning Act to exclude the jurisdiction of the court to grant declarations. Hodson L.J. took the view that, as planning is the creation of statute, Parliament had provided its own method for determining disputed questions and in so doing had given jurisdiction to the local authority and the Minister to the exclusion of the courts.

On the dispute as to whether the remedy available was by declaration or by certiorari, Lord Denning was of opinion that certiorari, since it is confined to judicial acts, was not available against the Minister who was not acting judicially but administratively in granting planning permission. He was clearly anxious to avoid an inquiry into the distinction between judicial acts and administrative acts, a distinction which "no-one has been able satisfactorily to define." On the other hand Lord Denning found good reasons for entertaining a claim for a declaration. If the court declared the Minister's conditions as to working the granite to be valid they would operate as a land charge and so must be registered in the Register of Land Charges. Moreover, no statutory remedy was available to enable the owner or a proposed purchaser to ascertain the validity before committing himself to the proposed development unless the validity could be determined by a declaratory action. The only other way of questioning in court a decision of a Minister would be for the developer to use his land in such a way as to invoke an enforcement notice for unauthorised development. If on appeal to the court the enforcement notice was upheld the developer would have to face the additional expense of putting the

land or building back into its original state. By a declaration a decision could be obtained before any money was spent on the object of the development.

Hodson L.J. on the construction of the relevant provisions of the Town and Country Planning Act was quite clear that Parliament had provided its own method for determining the question whether planning permission was or was not required, and in so doing had given exclusive jurisdiction to the local authority and the Minister. Therefore the court could not be asked to make a declaration in competition with those authorities. He, on the other hand, thought that the Minister's decision could have been properly impeached by certiorari if the proceedings had been brought in time. On this it may be observed that in *Barnard* v. *National Dock Labour Board* [1953] 2 Q.B. 18 in the Court of Appeal a declaration was allowed in a case where certiorari would have been available but for the expiry of the time limit. In *Vine* v. *National Dock Labour Board* [1957] A.C. 488, noted in [1957] C.L.J. 6, Viscount Kilmuir L.C. had emphasised the wide scope of the remedy by declaration, making it available where a substantial question existed which one person had a real interest to raise and the other to oppose. The way thus seemed clear for escaping from the time limit and other technicalities which surround orders of certiorari and similar remedies. As leave to appeal to the House of Lords was granted in the case under discussion there is still hope for a clarification of the differences of judicial opinion as disclosed in the judgment of the Court of Appeal.

E. C. S. Wade.

ADMINISTRATIVE LAW—CERTIORARI—ERROR OF LAW ON FACE OF THE RECORD

A recent note in this Journal, [1957] C.L.J. 115, cited *R.* v. *Medical Appeal Tribunal, ex p. Gilmore* [1957] 1 Q.B. 574, as enabling the High Court to review by certiorari decisions of administrative tribunals which under statutory authority are expressed to be final provided that the ground of the application is that an error of law is apparent on the face of the record of the tribunal's decision. To the long line of cases which show the extreme complexity of the law relating to the availability of certiorari must now be added *R.* v. *Patents Appeal Tribunal, ex p. Baldwin & Francis Ltd.* [1958] 2 W.L.R. 1010. The alleged error on the face of the record in this case was the misconstruction by the Tribunal of two rival specifications. The Court of Appeal, while conceding that the decision of the Tribunal was that of an inferior tribunal

to which certiorari would lie and that the specifications formed part of the record, found it impossible to determine whether the specifications had been misconstrued without hearing evidence to enable the Lords Justices to understand the language used. Now the court will not on an application for certiorari look at evidence given in the earlier proceedings or receive new evidence on affidavit. Unfortunately the language of the specifications was incomprehensible to laymen, amongst whom one must now include the Lords Justices of the Court of Appeal who, relying on dicta in judgments dealing with the admissibility of evidence in the 1840's, refused to allow certiorari to lie to the Patents Appeal Tribunal because they could not consider the meaning of the specifications without being instructed in the technicalities of electrical engineering.

Parker L.J. (as he then was) referred to *R.* v. *Northumberland Compensation Appeal Tribunal, ex p. Shaw* [1952] 1 K.B. 388, which showed that what is called a speaking order can be examined for error on the face of the record if the error takes the form of the misconstruction or misapplication of a statute or regulation. The judge, who was also a party to the earlier judgment, pointed out that the instant case was the first in which it could be argued—in his opinion successfully—that the error consisted in the misconstruction of some other document, in this case the specifications as distinct from the order of the Patents Appeal Tribunal. "Logically, however, if that document does form part of the record and the decision on its face shows that the Tribunal had misconstrued it, I do not see why certiorari will not lie" (at p. 1013). It is encouraging to those who are confident that in certiorari is to be found an effective means of controlling administrative tribunals to have this authority for extending its availability. Unfortunately it is not only documents relating to the contents of patents which are couched in language unintelligible to the layman without further explanation. Accordingly the case under review places limits on the availability of certiorari which are not confined to patent disputes.

E. C. S. Wade.

ALIEN—PERSONAL LIBERTY—PERMISSION TO LAND

Kuchenmeister v. *Home Office* [1958] 1 Q.B. 496 is an interesting illustration of the power of the courts to examine the exercise of a discretion which is sometimes cited in textbooks as an absolute discretion, namely the power of the Crown to grant or refuse leave to land to any alien coming from outside the United Kingdom. The circumstances of the case were that the plaintiff, a German

national resident in the Republic of Ireland, had booked a through ticket from Amsterdam to Dublin by K.L.M. This airline only operated the aircraft as far as London Airport, where it was necessary for Dublin passengers to transfer to an Irish aircraft which used a different section of the airport a mile away. The immigation authorities had instructions that the plaintiff was not to be allowed to land in the United Kingdom, he having been required to leave the country seven years earlier. He was not on this occasion refused permission to land, but was detained in the immigration hall close to where the aircraft had landed. Accordingly it was impossible for him to embark on the aircraft for Dublin which left from a point a mile distant. After an interval of two and a half hours the immigration officer obtained permission from the Home Office for the plaintiff to cross the airport to the point of departure of the Dublin aircraft, but it was then too late for him to board the aircraft. The result was that he had to spend the night at the airport as there was no other aircraft for Dublin until early the following morning.

The admission of aliens is governed by the terms of the Aliens Order, 1953, which is made under the Aliens Restriction (Amendment) Act, 1919. The Order contains elaborate provisions covering the circumstances in which immigration officers shall or shall not grant leave. In origin the control over the admission of aliens was a matter for the royal prerogative. Had it remained so, it is difficult to see how the action could have succeeded since the discretion of the Crown under the prerogative was an absolute one. In the event the plaintiff succeeded because the case resolved itself into interpretation by the court of a complicated series of Articles in the Aliens Order, 1953, and the plaintiff was able to persuade the court that his detention was not authorised by the particular Article upon which the defendants relied. For the inconvenience which the plaintiff suffered through spending the night at the airport against his will the judge awarded him £150, remarking that apart from the inconvenience, annoyance and humiliation which the plaintiff must undoubtedly have suffered, the right of individual liberty was in issue. At no time was the plaintiff in the position of an alien who had landed unlawfully or to whom leave to land had been refused. Article 2 (1) absolved him from the requirement of obtaining leave to land because he was under the terms of that Order landing from an aircraft at an approved port for the purpose only of embarking in an aircraft in the same port. That Article also required him to remain throughout the period between his landing and his embarkation within such premises as might be approved for the purpose by an immigration officer. The trouble

was that the immigration officer in this case required the alien to remain in a place which gave him no access to the plane upon which he wished to depart. The official could only have justified the detention by showing that the plaintiff was an alien who required leave to land, but the relevant Article absolved the plaintiff from any such requirement since he was merely changing planes in transit.

The case accordingly joins the long line of authorities which vindicate personal liberty when zealous officials exercise powers of detention or arrest where no such powers are expressly conferred by law. It is somewhat ironical that the Aliens Order, which was first made at the outbreak of the First World War for exercising greater control over aliens than the prerogative conferred, should have proved in the present case to have placed limitations on the discretion of immigration officials who, had they been still able to act under the royal prerogative, could have justified their conduct by reference to an absolute discretion. The judge stated that no possible blame could attach to the officer concerned for any misapprehension which he might have had as to the correct interpretation of the Order.

E. C. S. Wade.

CRIMINAL LAW—HOMICIDE ACT, 1957—DIMINISHED RESPONSIBILITY

In two reported cases decided early in 1958, the Court of Criminal Appeal further considered the statutory defence of diminished responsibility, originally invented by the Scottish courts, but only applicable in England by virtue of section 2 of the Homicide Act, 1957. In the first case, *R.* v. *Spriggs* [1958] 1 Q.B. 270, the court upheld a conviction for murder, but in the second, *R.* v. *Matheson* [1958] 1 W.L.R. 474, a full court of five judges in a reserved judgment substituted a verdict of manslaughter. In neither case did the accused deny the killing.

Spriggs shot a barman, who had, earlier in the evening, removed him from his bar. He returned, knocked on the door, and shot several times at the barman, killing him. The trial judge supplied members of the jury with a copy of section 2 (1) of the Act, and told them that it was for them to decide whether the accused " was suffering from such abnormality of mind . . . as substantially impaired his mental responsibility." He went carefully through the evidence, but did not attempt to explain to the jury the meaning of the actual words used by the legislature. The appellate court held that this was a proper way to sum up, and that it was not for the judge to embark upon " metaphysical and philosophical distinctions

between what is emotion and what is intellect and matters of that sort." The judgment of Lord Goddard C.J., is reminiscent of his similar approach to problems of possession in *Hibbert* v. *McKiernan* [1948] 2 K.B. 142. No doubt in legal matters common sense can carry one a long way; but on occasion it is necessary to expound difficult problems, and on the facts the case of *Spriggs* seems to be one such occasion. It is submitted that the requirement of a careful direction as to the law arose from the plea of the defence that Spriggs was a psychopath. The latter word, though originally colourless, has in the writings of psychiatrists become a technical term, denoting one who, unlike an insane person, did not begin life as a normal person only subsequently to suffer impairment of his faculties owing to mental disease, and, unlike a mental defective, does possess a normal degree of intellectual capacity, but has from the start behaved abnormally, and is built to an unusual pattern, a pattern that has remained fundamentally the same throughout his life. Counsel for Spriggs argued that a psychopath was one who suffered from abnormality of mind within section 2 (1), and that Spriggs was a psychopath. It is submitted that the court should have given a clear ruling on the former point, one not free from difficulty. Even in Scotland it is doubtful whether diminished responsibility is a defence open to psychopaths: *Carraher* v. *H.M. Advocate*, 1946 J.C. 108. The difficulty was evaded by leaving the whole matter to the jury, though a dictum can be gleaned from the judgment of Lord Goddard C.J. in favour of permitting the psychopath to plead diminished responsibility. His Lordship says (at p. 274) that there was evidence on which a jury might have found Spriggs to be suffering from such abnormality as to impair his responsibility. The only evidence was apparently that of psychopathic personality, as Spriggs had a high I.Q., and there was no evidence that he had ever suffered from any disease that would be calculated to impair previously normal faculties. It is submitted that our criminal courts are so obsessed with the importance of convicting men who are a danger to society, that they skate over legal difficulties for fear the jury will be muddled and acquit, thus contributing to the unfortunate state of our criminal jurisprudence.

The case of *Matheson* is of less interest, though a full court was assembled and reserved judgment. The accused, aged 52, killed a lad of 15, who had previously been his partner in homosexual activities, and was demanding higher remuneration, under circumstances of revolting savagery. The medical evidence was unanimous that Matheson was a psychopath, and was feeble-minded, his mental

age being rather less than that of a child of 10. The jury nevertheless rejected his plea of diminished responsibility. The appellate court held that this finding was unsupported by the evidence, and substituted a conviction for manslaughter. The jury obviously did not want Matheson to live: he was charged with capital murder as he also stole his victim's wages. Evidence before the Royal Commission on Capital Punishment had suggested that if diminished responsibility became a defence, juries would be too lenient (see Cmd. 8932, September, 1953, p. 143, para. 412). *Matheson's* case shows that juries feel militant towards monsters, just as they are usually merciful to motorists charged with manslaughter. In *Matheson's* case the psychopath point did not arise, as the accused was clearly a mental defective. The full court also gave a ruling on a point of practice, that on a charge of murder a plea of guilty of manslaughter on the ground of diminished responsibility should not be accepted, but the issue must be left to the jury.

R. N. Gooderson.

CRIMINAL LAW—DANGEROUS DRIVING—DEFENCE OF AUTOMATISM

In *Hill* v. *Baxter* [1958] 1 Q.B. 277 (Divisional Court) the defendant was charged with dangerous driving contrary to section 11 of the Road Traffic Act, 1930, and with failing to conform to a traffic sign contrary to section 49 (*b*) of the same Act. The defence raised was automatism: that he had become unconscious as the result of a sudden illness. The only evidence of this was that of the defendant himself, except for two medical reports put in with the agreement of the prosecution; these added nothing, however, to the defendant's account. The magistrates, believing the defendant when he said that he could not remember what happened and concluding that he was unconscious at the time of the accident, dismissed the informations.

On appeal by case stated it was held that there was not sufficient evidence to justify the magistrates' conclusion. Lord Goddard C.J. considered the defendant's evidence to be equally consistent with his having fallen asleep at the wheel or having his mind full of other matters and not paying sufficient attention. Devlin J. held that since the defendant had not challenged the legal presumption of sanity, the magistrates were required to presume that he was not suffering from a disease of the mind, and that in order to succeed the defendant had to show that his irrationality was due to some cause other than disease of the mind. This line of reasoning, it is submitted, might lead to curious results. Suppose that a passenger observed the driver suddenly becoming unconscious,

would the magistrates still be precluded from acquitting unless he either pleaded insanity or showed that his unconsciousness was due to some cause other than disease of the mind? Pearson J. held that if the onus of proof was on the prosecution, it had been discharged by showing that the defendant was driving and driving with skill, and that if the onus was on the defendant, he had failed to prove an extraordinary mischance rendering it impossible for him to control the car and direct its movements. This, it is submitted, places an excessive burden on the defence in such cases, since in the present state of scientific knowledge it may not be easy to prove the cause of such a condition. One can imagine a case where unconsciousness is brought about by a blow on the head from a stone, but where the defendant driving alone is unable to say what caused the unconsciousness. Surely the possibility of his having become unconscious should at least be open to the magistrates or the jury, whose good sense, it is submitted, should be an adequate safeguard, since they would not lightly acquit on the ground of automatism without some evidence of the cause thereof.

The magistrates in their finding concluded that, because the defendant was unconscious, he was incapable of forming any intent to drive. Lack of intention, however, is a matter which goes to the absence of *mens rea*, as in the defences of accident and mistake, whereas automatism operates not to prevent the defendant from having *mens rea* but to preclude the existence of a voluntary act and therefore of an *actus reus*. This is clear from *R.* v. *Harrison-Owen* [1951] 2 All E.R. 726 where it was held on appeal that evidence of previous convictions to show intent and so negative a defence of automatism was wrongly admitted since the defence did not put intent in issue. In *Baxter's* case it is clear that if the court had accepted the defendant's plea of automatism, he would have been exempt from responsibility even though the offence was one of strict liability where the absence of *mens rea* would be no defence (*per* Lord Goddard C.J., at p. 282).

Baxter's case also shows that the borderline between automatism and insanity is by no means clear. In *R.* v. *Kemp* [1957] 1 Q.B. 399, where the defendant pleaded automatism in the form of unconsciousness arising from arteriosclerosis, Devlin J. allowed the prosecution to raise the question of insanity and adduce evidence that the defendant was suffering from melancholia, a disease of the mind. The learned judge then held that the words " disease of the mind " covered not only melancholia, but also arteriosclerosis on the ground that the words were inserted in the McNaughton Rules to exclude defects of reason due to brutish stupidity without rational power. Consequently on either view of the evidence the

defendant came within the McNaughton Rules. With respect, this would seem to be an extension of the rules. Hitherto it seems to have been generally thought that legally insane persons formed a sub-class within the wider class of medically insane persons (*cf.* Report of the Royal Commission on Capital Punishment, Cmd. 8932, pp. 73 *et seq.*; Glanville Williams, *Criminal Law*, pp. 292, 296; Goodhart, *Essays in Jurisprudence and the Common Law*, pp. 46–47). In *Baxter's* case Devlin J. follows his previous judgment to the extent that he considers that there are only two alternatives open to a defendant: either he must plead insanity or he must show that his unconsciousness is due to some external cause other than disease of the mind.

The chief difficulty, however, raised by the defence of automatism is that while one feels that a person acting under hypnosis, somnambulism, an epileptic fit or some other automatic condition should be excused from criminal responsibility even for offences of strict liability, because his acts are not voluntary, at the same time the interest of the community demands that such exemption should not be extended to persons who have merely fallen asleep at the wheel of a motor-car, because even if their subsequent driving is no longer voluntary yet they could have taken care not to fall asleep. The problem is to formulate a rule to distinguish the former from the latter type of case. Merely to say that the accused is exempted from responsibility for non-voluntary acts will not suffice, since driving in one's sleep is no more voluntary when the sleep is natural than when it is hypnotic. In *Baxter's* case Pearson J. suggested that though a driver who has fallen asleep is no longer driving, there was an earlier time at which he was falling asleep and therefore failing to perform the driver's elementary duty of keeping himself awake, and therefore he was driving dangerously. This would serve to distinguish the case from the case of the driver who suddenly becomes unconscious through no fault of his own. Attractive as this approach is, it is not without difficulties. In the first place it is surely contrary to ordinary language to say that a person who has fallen asleep at the wheel is no longer driving; such conduct is usually described as "driving in one's sleep." Secondly, it seems odd to say that a person who drives a car without endangering anybody is driving dangerously merely because he knows that he may fall asleep or may have an epileptic fit. The criminal law need not necessarily follow ordinary usage, but it is better to do so if possible, if only because the divergence of legal from ordinary language can be a fertile source of problems. It is submitted that the solution is to be found by following ordinary usage, according to which it is natural to speak

of a man asleep at the wheel as driving dangerously (provided that the driving is dangerous) but odd to speak of a man as driving dangerously if he is suffering from an epileptic fit or if he has been knocked unconscious. In this way the latter type of defendant can be exempted without preventing the court from convicting the former.

P. J. Fitzgerald.

EVIDENCE—ADMISSIBILITY—SELF-SERVING STATEMENTS OR CONDUCT

It is a familiar if anomalous rule of the law of evidence that although statements made by a party before the trial may be proved if they tend to discredit that party's own evidence, statements made by him which are consistent with his evidence are inadmissible. Of a variety of explanations for the rule, that which seems to have achieved the largest measure of acceptance is that a person's statement against his own interest may be presumed to be true as against him, but that no such presumption exists in respect of what are sometimes called " self-serving " statements. On the contrary, the risk of fabrication is taken to be so great that such statements must in general be excluded. This view of the matter commended itself to the majority of the Court of Appeal in *Corke* v. *Corke & Cooke* [1958] P. 93; but Morris L.J., who found himself able to escape from authority, evidently preferred to disregard these considerations and not to apply the rule.

Corke v. *Corke & Cooke* was a divorce case in which a husband petitioned on the ground of his wife's adultery with her lodger. He had kept watch on the wife's lodging-house one night and, after hearing the wife and the co-respondent together in the co-respondent's bedroom, had confronted the couple and accused them of adultery. This they had denied and, shortly after the husband's departure, the wife telephoned to a doctor asking him to carry out an examination with a view to establishing that intercourse had not taken place. This the doctor refused to do because an examination would be useless for the purpose. The learned commissioner who tried the case admitted evidence of the telephone call, but the Court of Appeal, Morris L.J. dissenting, held that he was wrong.

The division of opinion in the Court of Appeal can be interpreted as arising from different analyses of the facts. The majority, pointing out that evidence of the telephone call was meaningless without evidence of what was said, held that the rule against self-serving statements must be applied. Morris L.J., on the other hand, held that the evidence was evidence of conduct, albeit self-serving conduct, and not of a statement. The rule was, therefore, not applicable and the evidence was admissible.

To adopt this interpretation, however, would be to ignore the underlying difference of policy which is to be found in the judgments. The majority plainly approved the rule and drew attention to the ease with which self-serving evidence can be fabricated. Whether or not evidence of the telephone call is regarded as a statement, it was certainly self-serving and so worthless. It seems clear that even in the absence of authority they would have excluded the evidence.

Morris L.J., on the other hand, having escaped the fetters of authority, founded himself upon the basic principle that the test of admissibility is relevance. To the issue whether the wife had committed adultery the evidence of the telephone call was plainly relevant, for relevance is to be judged by "applying a fair-minded common-sense approach," and since "conduct which suggests guilt may be proved, so may conduct which suggests innocence."

The distinction between statements and conduct is one which can often disappear almost to vanishing point, as indeed was the position in the present case, and there is little merit in a rule of law founded upon it. The real question is whether self-serving evidence should be admissible. The majority, influenced by the fear of fabrication, held that it should be excluded and so adhered to traditional thinking on the point. Morris L.J., influenced, it may be thought, by more modern principles of fairness and reason, preferred to admit the evidence. Even though the danger of fabrication be admitted, this is a matter which should go to the weight of the evidence rather than to its admissibility.

As seems to be so often the case with our rules of evidence, the rule against self-serving statements is no longer required in modern conditions. The risks attendant upon their admission in evidence are easily exaggerated while the unfairness of their exclusion is manifest. It is submitted, with great respect, that the decision of Morris L.J. is to be preferred to that of the majority in the present case.

J. A. Jolowicz.

MARRIAGE BY PROXY—REFUSAL TO CONSUMMATE—CHOICE OF LAW

Ponticelli v. *Ponticelli* (*orse. Giglio*) [1958] 2 W.L.R. 439 concerned two Italians. The man had settled in this country, acquiring an English domicile. Later he married an eighteen-year-old girl living in his home town in Italy, by means of a ceremony conducted there by proxy in his absence. After an interval she travelled to England, but on meeting him immediately made it clear that she considered she had been forced into the marriage by her relatives, that she

did not want him as her husband, and that she intended to return to Italy as soon as possible. This she did; and the husband petitioned for a decree of nullity.

There could be no doubt, since *Apt* v. *Apt* [1948] P. 83, that as the *lex loci celebrationis* permitted a proxy ceremony, this marriage must be recognised. Whether it was voidable, however, on the ground of wilful refusal to consummate depended on which law, Italian or English, was to apply; and on this there was little authority.

The problem was one of characterisation. Was refusal to consummate a matter pertaining to the formal validity of the marriage so that the *lex loci* applied? Barnard J. in *Robert* v. *Robert* [1947] P. 164 had taken such a view, regarding it as "a defect in marriage, an error in the quality of the respondent"; but Sachs J. in the present case rejected this analysis. Was it then a matter of capacity to be governed by the *lex domicilii* (meaning the husband's domicile at the time of marriage though possibly the intended matrimonial domicile), or was it analogous to a ground for divorce and so to be governed by the *lex fori*?

An answer to this question was not essential in this case because once the *lex loci* had been rejected the result on any view was an application of English law; and a decree could therefore be granted. But Sachs J. paused to consider the relative merits of the *lex domicilii* and the *lex fori*.

The former received some support from *Way* v. *Way* [1950] P. 71; and the judgments of the Court of Appeal in *de Reneville* v. *de Reneville* [1948] P. 100, though of uncertain relevance to this question, "tend against *lex fori*." Further, there was high authority for regarding refusal to consummate (though necessarily post-nuptial) as a defect in the validity of a marriage. Denning L.J. had declared, albeit in a jurisdiction case, that "no-one can call a marriage a real marriage when it has not been consummated; and this is the same . . . whether the want of consummation is due to incapacity or to wilful refusal" (*Ramsay-Fairfax* v. *Ramsay-Fairfax* [1956] P. 115, 133). Thus, as a matter affecting the marriage's initial validity, refusal to consummate ought clearly to be governed by one law alone. As Sachs J. pointed out, "it would be unfortunate indeed if a marriage were to be held valid or invalid according to which country's courts adjudicated on the issue." Consistency could not be attained through application of the *lex fori*, and so the *lex domicilii* was to be preferred.

This solution, while clearly to be welcomed, is not entirely free from difficulty. It is still uncertain whether the reference should be to the law of the husband's domicile at the time of marriage or

to the law of the intended matrimonial domicile in a case of difference. Nor is it clear whether an English court would be prepared to apply the principle uniformly. Would it for example annul a marriage on the ground of mistake as to the husband's personal attributes if the *lex domicilii* were German law, which provides such a ground? One suspects that it would not.

J. C. Hall.

COMPANY LAW—EFFECT OF ARTICLES AS CONTRACT—REMEDY AGAINST DIRECTORS

The important case of *Rayfield* v. *Hands* [1958] 2 W.L.R. 851 is the first decision on a problem which has long troubled company law. Section 20 of the Companies Act, 1948, and its predecessors, establish that a company's memorandum and articles of association "shall when registered bind the company and the members thereof to the same extent as if they respectively had been signed and sealed by each member, and contained covenants on the part of each member to observe all the provisions of the memorandum and articles." Previous cases have made it clear that this section makes the articles into a contract between the *company* and each member, "in respect of their rights and duties *as members*." The existence of some such contract with the company is now clear law, in spite of the fact that the section does not read "by each member *and the company*." The unsolved problem has been whether the articles are also a contract between the members *inter se*. At first sight they do seem to be given that effect by section 20. The section is obviously derived from the partnership law that gave birth to the Companies Acts. It treats the articles in a manner similar to the contract between partners. The words used are even more apt to describe a contract between members than between the members and the company. But it has often been doubted whether that is the proper interpretation of the section. There does not seem to have been any occasion on which the courts have enforced the articles as a contract, in a case in which a member sued another member rather than the company.

In *Rayfield* v. *Hands* that situation did arise, and Vaisey J., in a reserved judgment, decided that articles do constitute a contract between members because of the words of section 20. But the reasons for his actual decision in the case are not likely to escape criticism.

At one point, for example, he seemed to regard it as relevant that he had before him the articles of a *private* company, since he pointed out that "this private company is one of that class of

companies which bears a close analogy to a partnership." But there is nothing in section 20 which distinguishes between the contractual effect of articles in private and in public companies. Clearly nothing turns on this distinction.

The article in question stated: "Every member who intends to transfer shares shall inform the directors who will take the said shares equally between them at a fair value." In this action a member sued the directors who had refused to take his shares and who happened, also, to be members of the company; directors were required by the articles to have a share qualification. Vaisey J. regarded the obligation to take the shares as mandatory. But, even so, the defendants argued that the obligation lay upon them *qua* directors, not *qua* members; and, therefore, in the light of decisions such as *Hickman* v. *Kent & Romney Marsh Sheepbreeders' Association* [1915] 1 Ch. 881 and *Beattie* v. *Beattie, Ltd.* [1938] Ch. 708, the articles could not be used to enforce a duty which concerned them otherwise than in their capacity as members.

The learned judge rejected that contention. This obligation rested upon them, he said, "as members." He gave few reasons for this distinctly odd construction of the article, beyond the citation of dicta from a case of 1885 where directors were described as "working members." In the modern law, it is clear that this is a false approach to the position of directors. Directors, it is true, usually are members, if only because the articles of their company invariably require them (as here) to have a share qualification. But that need not be so. They might not be members at all. An obligation of the kind imposed by this article was surely one which lay on them as directors, and not as members. When they refused to fulfil the article, surely they were in breach of the duty which they owed as directors to the company itself.

From his construction of the article, the learned judge proceeded to develop his argument in three ways. First, he said that even if the articles were held to be a contract only between each member and the company, the defendants, "as members," owed a duty to the company to take the shares. From this premise one expects the conclusion that the company would be the proper plaintiff in any action to enforce that contract. But Vaisey J. considered that the injured member, even though on this view a third party to the contract, could sue on it because of section 56 of the Law of Property Act, 1925, and the well-known dicta of Denning L.J. which give that section a sufficiently wide interpretation to destroy privity of contract altogether. It is suggested that section 56 intended no such reform (*cf.* [1954] C.L.J. 66) and that this is not the correct

solution to a problem of company law which has been with us since 1862.

Secondly, Vaisey J. thought that the plaintiff could rely upon *Carlill* v. *Carbolic Smoke Ball Co.* [1893] 1 Q.B. 256, "to which I need not refer except to say that it seems to me to be relevant here." It is not easy to see quite what this passage in the judgment means.

Thirdly, he held that section 20 made the articles into "a contract between the shareholders *inter se* in respect of their rights as shareholders" (as was said in *Hickman's* case). It is respectfully submitted that this is a correct interpretation of the section, although some of the cases cited by Vaisey J. do not really support it. This finding, together with his construction of the article as a "membership-duty," was enough to conclude the case, without the other two lines of argument.

In all this, Vaisey J. plainly accepted the idea that the plaintiff could not have enforced the article if the duty which it imposed upon the defendants had been put upon them as directors rather than as members. Indeed his belief that he ought to construe articles *ut res magis valeat quam pereat* was clearly the main cause of the strange construction which he put on the article. But is it really true that such a plaintiff would be without relief if the obligation had turned out to be a "director-duty," as, it is submitted, should have been the case?

The present writer has recently argued that there are many cases of high authority which show that the orthodox formulae usually derived from cases like *Hickman* do not represent the full story: see [1957] C.L.J., at pp. 207–214. In the present context those arguments would lead to the following propositions:

(1) Articles constitute a contract both between each member and the company and between members *inter se*.

(2) A member can sue, or be sued, on that contract only if he appears in his capacity as member. Most cases in which plaintiffs failed (such as *Beattie's* case) illustrate failures to observe this principle.

(3) A plaintiff member has not only the specific rights granted by the articles; he also has the right to sue the company, and possibly other members, in order to restrain them from bringing about a breach of the articles. He can do this even if it means the indirect enforcement of "outsider-rights" which the articles purport to give to a third party, or even to himself. *Quin & Axtens, Ltd.* v. *Salmon* [1909] 1 Ch. 311, affd. [1909] A.C. 442, is the best example of such a

case. There the plaintiff must have sued *qua* member because he brought a representative action on behalf of the shareholders; and he sued the company to prevent it from departing from the articles. The departure lay in the failure to observe articles which purported to give certain powers to a director—namely the plaintiff. But this fact did not prevent him from succeeding *qua* member and having that "outsider-right" indirectly enforced: see [1957] C.L.J., at p. 212; and Stiebel, *Company Law* (3rd ed.) p. 92. It might surely be argued that *Rayfield* v. *Hands* illustrates the converse case. Even if, as seems preferable, the obligation to take the shares is construed as a "director-obligation," the plaintiff can still sue the defendants because they were in fact members who had brought about a breach of the contract in the articles. If they had been ordinary members who had in some way prevented the directors from buying the shares, they would surely have been liable. Why should they escape only because they were also the directors themselves?

At this point, three objections can be raised. First it may be said that an argument of this sort in effect destroys the distinction between "membership-duties" and "outsider-duties" recognised in all the modern cases. To this, reply can be made that the decision of the House of Lords in *Salmon's* case does, indeed, appear to give a different twist to the propositions accepted in cases like *Hickman*. So long as the parties can, by appropriate juggling, be made to appear *qua* members, the problem is solved.

Secondly, however, the more serious objection will be taken that this argument allows an individual member to sue directors (who also happen to be members) for failure to fulfil their duties as directors; and that the normal rule is, of course, that such duties are owed exclusively to the company itself. Thirdly, even if that were allowed, the injured member could sue only when, as in our case, the directors by chance happened to be members themselves, which seems absurd. These objections are weighty. There are, it is true, cases in which members seem to have sued other members to restrain them from breaking the articles in their capacity as directors, *e.g.*, *Catesby* v. *Burnett* [1916] 2 Ch. 325. But it would plainly accord better with the rest of our company law if such actions were not allowed between individual members. In such cases it is suggested that the plaintiff member can sue only *the company*. In particular, when the articles have been broken by directors acting as directors, the company surely takes responsibility

for their acts. The injured member can therefore call upon the company not to allow this breach of contract, as he did in *Salmon's* case.

Thus it is submitted that the law in *Rayfield* v. *Hands* is acceptable in so far as it supports the view that there is a contract between members *inter se* under section 20; but Vaisey J.'s construction of the particular article is open to criticism. The opposite construction of that article would not, however, in the writer's view (which students of company law will realise is somewhat heterodox) leave the plaintiff without a remedy. It is arguable that he ought, even then, to be allowed to sue the defendants individually. But the better view probably is that in such a case his action should be brought against the company. That action would be another example of the enforcement of "personal rights" derived from the articles, which in the writer's submission can be shown to be largely inconsistent with the received interpretation both of the propositions in *Hickman's* case and of the Rule in *Foss* v. *Harbottle*. But the authority for such a view ought not any longer to be ignored. It is, indeed, curious that the company was not joined as a defendant in *Rayfield* v. *Hands*.

K. W. Wedderburn.

COMPANY LAW—MEMBERS' RIGHTS—OPPRESSION OF MINORITY

The Companies Act, 1948, tried, *inter alia*, to strengthen the hands of members against management. The courts in two recent decisions have shown that they are willing to interpret the new sections of the Act widely, in order to effect that policy, although it must be noticed that both cases involved small private companies in which alone the policy still has much significance. In *Re El Sombrero, Ltd.* [1958] 3 W.L.R. 349 for example, Wynn-Parry J. ordered a company meeting to be held, and to be valid even if attended only by the applicant shareholder alone, in order that the latter could secure the passing of the necessary ordinary resolution to dismiss the directors, under the new procedure of section 184. He did this in spite of the fact that the terms of the company's articles of association, on which the directors relied, in effect provided against any meeting being held. The decision shows how determined the courts will be to prevent management from obstructing the control over it which section 184 gives to members.

More important still is the first decision of the House of Lords concerning section 210. That section provides that a member "*who complains that the affairs of the company are being conducted in a manner oppressive to some part of the members* (*including*

himself) " may apply to the court. If the complaint is proved, and the facts would justify a winding-up order on the ground that dissolution of the company would be " *just and equitable* " (under section 222) but the court considers that dissolution would " *unfairly prejudice* " the oppressed members, then the court may make such order as it thinks fit for regulating the company's affairs, or for purchase of the minority's shares, " *or otherwise.*" The importance of this section is increased by the interpretation put upon it in *Scottish Co-operative Wholesale Society Ltd.* v. *Meyer* [1958] 3 W.L.R. 404 (H.L.Sc.). Not for the first time, a case originating in Scotland has had a liberalising effect upon our company law.

An outline of what Viscount Simonds called " this discreditable tale " is soon told. The appellants, S.C.W.S., had entered in 1947 into a joint enterprise with the respondents for the manufacture of rayon cloth, which was then subject to control. S.C.W.S. knew little of this business; but the respondents were experts, and obtained the necessary licences. A subsidiary private company was formed. S.C.W.S. took 4,000 £1 shares; the respondents took 3,900. S.C.W S. had the right to appoint three directors, and they appointed three of the twelve directors of S.C.W.S. itself. The two respondents were the managing directors. S.C.W.S. wove yarn at their own mill, then sold it to the company. The venture prospered; and the £1 shares were soon worth about £6. Disputes arose, however, because S.C.W.S. wished to obtain further shares in the company at par; not unnaturally the respondents objected. The society decided to take over the rayon trade for itself. By 1952, when cotton control ended, S.C.W.S. had formed its own departments for the rayon business. Being now free to obtain yarn without licence, they adopted a policy of starving the company of the supplies of cloth on which it depended. In 1953 the respondents offered to sell out at £4 16s. 0d. per share; but S.C.W.S. refused the offer. The board of S.C.W.S. had in fact resolved that the company had served its purpose. Its nominee directors adopted a policy of passive support for that decision by inactivity in the face of the company's declining trade. The respondents petitioned under section 210, and the Court of Session ordered S.C.W.S. to buy out their shares at £3 15s. 0d. each.

In four weighty speeches the members of the House of Lords upheld that decision. Of the many important and stimulating points made, a short note does not permit more than a summary:

(1) Their Lordships all agreed that there had been " oppression." Viscount Simonds had in mind something " burdensome, harsh and wrongful "; to Lord Keith it

suggested "lack of probity and fair dealing." Further, dissolution of the company would "unfairly prejudice" the respondents "because they would only recover the break-up value of their shares" (Lord Denning). Compulsory purchase by S.C.W.S. was the appropriate remedy to end the oppression.

(2) It did not matter that the effect of the court's order would be to bring the company effectively to an end. Section 210 did not apply only to cases where the company had a "continuing life ahead of it" (Lord Keith). The remedy is available both in cases of "moderate oppression" and "when the oppression is so great as to put the company out of action altogether," even if the oppressor in the latter case is "destroying the value of his own shares with those of everyone else" (Lord Denning). This is a most useful extension of the remedy created by section 210.

(3) It is to be noticed, however, that the facts must be such that they *could* support a "just and equitable" winding-up order. It was agreed on all sides, in this case, that they could. But in future cases petitioners may find this limitation a serious obstacle to success (*cf. Re Cooper Ltd.* [1937] Ch. 392).

(4) The appellants, however, argued that the oppression did not take place in conducting "*the affairs of the company*," as the section required. The incorporated society was a different legal entity; and the complaints referred really to the conduct of *its* affairs. Lord Morton accepted this argument, so far as it went; but he was able, though with difficulty, to avoid the conclusion to which it led by treating the nominee directors' inactivity as part of the manner in which the affairs of the *company* were conducted. Lord Denning was more confidently clear that the company's affairs could be "conducted oppressively by the directors doing nothing to defend its interests when they ought to be doing something." Lord Keith and Viscount Simonds also used this argument. But both of them, and Lord Denning, went further.

Lord Denning was willing to say that the affairs of the company could be thought of as being conducted by "those in control of its affairs"; they might be the directors, or the shareholders behind them. Viscount Simonds decided, in an even more radical speech, that it was not possible to separate the transactions of this society from those of its subsidiary company. The former could not only make use

of the "ordinary and legitimate weapons of commercial warfare"; it could also "control from within" the affairs of the company. This resolute determination to pierce the corporate veil was shared by Lord Keith. Indeed, the latter took the view that "the company was in substance, though not in law, a partnership consisting of the society and the respondents"—an interesting echo of the old cases preceding *Salomon* v. *Salomon* [1897] A.C. 22 which occasions less surprise when it comes from a Scottish judge. In more than one place in his speech, Lord Keith draws an analogy with the duties owed by partners to one another.

More radical still, both Lord Keith and Viscount Simonds adopted with approval a dictum of Lord Cooper's in the Court of Session to the effect that: "whenever a subsidiary is formed . . . with an independent minority of shareholders, the parent company must, if it is engaged in the same class of business, accept . . . an obligation so to conduct what are, in a sense, its own affairs as to deal fairly with its subsidiary." This pregnant proposition is of major importance for company law. Lord Keith developed it by adding that conducting the affairs of the parent "may amount to conducting the affairs of the subsidiary"; this might become *mis*conduct in the shape of "passive conduct, neglect of interests, concealment from the minority of knowledge that it is material for the company to know. That, in my opinion, is what happened here."

Here is a striking case of judicial recognition of the reality of a "group enterprise." Both in this case and in *Holdsworth (Harold) & Co. (Wakefield), Ltd.* v. *Caddies* [1955] 1 W.L.R. 352 (H.L.Sc.)—in which Lord Keith curiously enough dissented—their Lordships have broken through technical arguments based upon the separate legal "personality" of parent and subsidiary companies. What is urgently needed is a principle from which litigants can predict when the courts will, and will not, lift the veil of the corporate entity. We can, at least, now be sure that the process is more likely to occur in the case of a group.

As for the relations of parents and subsidiaries, the propositions accepted by Lord Keith and Viscount Simonds will give food for thought to those who control the former. The interests of a subsidiary as a separate economic enterprise cannot be ignored by them, when an independent minority exists among its members. This will undoubtedly increase the difficulty of deciding whether or not the parent's

members have voted, or its directors acted, "in the best interests of their company as a whole."

(5) Lastly, what about the position of the three directors who were on both boards? Their Lordships all seem to be in agreement that they had broken their duty to the company by consulting the interests not of it, but of S.C.W.S. But Lord Denning went further. The orthodox view is that there is no obligation upon a director not to become a director of a rival company, at any rate so long as he does not pass on to it confidential information: *Bell* v. *Lever Bros., Ltd.* [1932] A.C. 161, 195, *per* Lord Blanesburgh. Professor Gower has suggested that this may not be the law in the light of cases which bind mere servants to a stricter duty of fidelity, and which have even precluded them from spare-time work for competitors: *Modern Company Law* (2nd ed.) p. 496. Lord Denning relied upon one such case. Once the interests of their two companies diverged, he thought, the directors were in an "impossible position." Their duty was to promote the company's business and "not even to work for a competitor when to do so might operate to the disadvantage of the company." But, as directors of S.C.W.S., they owed to that society an equivalent duty. Lord Blanesburgh may have been right in 1932; but such activity ran "the risk now of an application under section 210." If this is correct, it becomes interesting to ask whether the directors could not be called personally to account by the company for the loss it had suffered; or whether, if they prevented the company from suing, they could be sued by the minority in an action brought on the company's behalf, the rule in *Foss* v. *Harbottle* being displaced in the face of this "fraud by those in control of the company." If so, the dangers of personal liability which such interlocking directorships can bring about are greater than most directors have supposed.

(6) The last word was with Lord Denning. This "liberal interpretation" of a new section, "designed to suppress an acknowledged mischief," was proper in the first case to come to the House. It was "in accordance with long precedent —and particularly with the resolution of all the judges in *Heydon's* case—that your Lordships should give such construction as shall advance the remedy. And that is what your Lordships do today." The day will be long remembered by company lawyers.

K. W. Wedderburn.

DEFAMATION—FAIR COMMENT ON UNTRUE FACTS—PRIVILEGE

In *Addis* v. *Odhams Press, Ltd.* [1958] 3 W.L.R. 16, the Court of Appeal considered the decision at first instance noted in [1958] C.L.J. 28. The case was noted as an interesting illustration of a limited exception to the rule that for a defence of fair comment to apply the defamatory words complained of must be an expression of opinion based on true facts. The exception to this normal rule arises where the defamation complained of lies in allegations of fact, and defamatory comment thereon, and the allegations of fact are privileged as being, for example, part of a fair and accurate report of parliamentary or judicial proceedings. The Court of Appeal confirmed this exception in the following words: "If a statement made by a witness is fairly and accurately reported, and attributed to the witness who made it, then, no doubt, although the evidence given by the witness is afterwards shown to be false, the statement reported can be made the subject of fair comment": [1958] 3 W.L.R. 16, at p. 23. On the particular facts, however, they overruled the trial judge, holding that the matter commented on was not privileged as it was not in fact a fair and accurate report of the judicial proceedings.

A. Ll. Armitage.

MASTER AND SERVANT—VICARIOUS LIABILITY—MASTER'S INDEMNITY AGAINST SERVANT

In *Harvey* v. *R. G. O'Dell, Ltd., Galway (Third Party)* [1958] 2 Q.B. 78 the plaintiff and one Galway were both in the employment of the defendants, Galway being employed as a storekeeper. From time to time he made use of his own motor-cycle combination on his employers' business and he was doing so when the accident which gave rise to the case occurred. Owing to his negligent driving he was involved in an accident in which he was killed and the plaintiff injured. The plaintiff thereupon sued his employers for Galway's negligence and the defendants joined Galway's widow and administratrix as third party. Against her they claimed to be reimbursed for the damages they were liable to pay to the plaintiff, relying both upon the principle of *Lister* v. *Romford Ice & Cold Storage Co.* [1957] A.C. 555, and upon the combined effect of the Law Reform (Miscellaneous Provisions) Act, 1934, and the Law Reform (Married Women and Tortfeasors) Act, 1935.

Although a substantial part of McNair J.'s judgment is taken up with the question whether Galway was acting in the course of his employment, the principal interest of the case lies in the third party proceedings which followed his decision that the defendants

were liable, and it is with this aspect of the case alone that the present note is concerned.

It may be recalled (see [1956] C.L.J. 101; [1957] C.L.J. 21) that in *Lister's* case the ground upon which it was held that Lister was liable to his employers was that he owed them a contractual duty to drive his lorry with reasonable care and that they were entitled to damages for breach of that duty. Since the employers were altogether free from blame for the accident the damages were equivalent to the amount that the employers had had to pay as a consequence of Lister's negligence.

It was contended by the defendants in the present case that, since it had been held that Galway had been negligent in the course of his employment, they were entitled to succeed against the third party by a simple application of *Lister's* case. McNair J. held, however, that there was a vital distinction between the two cases. In *Lister's* case Lister had been employed as a lorry driver and had been guilty of negligence in driving his lorry. In the present case, however, although Galway had been guilty of negligent driving, his employment was not that of a driver but of a storekeeper. In his contract of employment, therefore, there could be no implied term to the effect that he would drive with reasonable care, and the claim based on *Lister's* case failed.

McNair J.'s decision on this part of the case invites respectful criticism. Although the argument that an employee only undertakes to exercise reasonable care in doing those things for which he has been specifically employed is at first sight attractive, a more realistic interpretation of *Lister's* case is, surely, that the undertaking extends to all acts which fall within the course of employment. This was, essentially, the defendants' contention in the present case. More important, however, is the fact that McNair J.'s decision defeats not only the policy underlying the majority decision in *Lister's* case, but also that to be found in the speeches of the minority. The majority decision of the House of Lords is based upon the traditional common law policy that the person whose fault has actually caused the damage should bear the loss, that of the minority upon the policy that losses should be borne by the person best able to distribute them by insurance. In the present case, not only was Galway the person whose fault had actually caused the damage but, as owner of the vehicle involved, he was also the person best able to insure against that damage. Yet McNair J.'s decision would, had it not been for his answer to the claim based on statute, have fixed the loss finally upon the shoulders of the innocent and very possibly uninsured employer.

Having decided this point in favour of the third party, McNair J. proceeded to deal with the position under the Acts of 1934 and 1935. These two Acts presented difficult questions of statutory interpretation which cannot be considered here. What is of particular interest is that, having held that he had power to award contribution under the Act of 1935, McNair J. ordered that the contribution payable by the third party should amount to a complete indemnity. "Inasmuch," he said, "as the . . . defendants' liability on the facts found is purely vicarious, the claim for contribution by Galway . . . should, in my view, be for 100 per cent."

Section 6 (2) of the Act of 1935 provides that the contribution recoverable from any person "shall be such as may be found by the court to be just and equitable having regard to the extent of that person's responsibility for the damage." Though it is also provided that contribution may amount to a complete indemnity there has been some indication that in cases such as the present the courts might refuse to order a servant, though wholly to blame for damage, to pay for the whole or even any part of it. In *Jones* v. *Manchester Corporation* [1952] 2 Q.B. 852, for example, Denning L.J. (as he then was) said that in cases of master and servant "it is entirely a matter for the discretion of the court under the Act of 1935 whether it should order any, and, if so, what contribution or indemnity between them." In *Lister's* case in the Court of Appeal [1956] 2 Q.B. 180, the same learned judge urged that the employer's claim fell within the power given by the Act "to exempt any person from liability to make contribution" and that that power should be exercised, at any rate if the employer is covered by insurance.

In the light of his rejection of the claim based upon *Lister's* case it seems that McNair J. cannot be counted amongst those who look upon the majority decision in that case with great favour. It might have been thought, therefore, that he would make use of the discretion given by the Act of 1935 so as to relieve Galway's estate of some or all of its liability. That he did not do so is encouraging to those who adhere to the principle of individual responsibility rather than to that of loss distribution, for this is the first case in which the claim at common law has been rejected and yet a full indemnity has been awarded under the Act. Moreover, the fact that McNair J. gave so restrictive an interpretation to *Lister's* case ceases to be a matter of great importance. Provided that an employer whose liability is purely vicarious can always recover a full indemnity under the Act, the decision of his claim at common law is unimportant. It is only if judges are tempted to relieve servants of their proper liabilities on account of their

presumed poverty in comparison with employers or insurance companies that it is necessary to insist upon establishing and upholding common law rights. If McNair J.'s decision on this part of the case is followed, elaborate discussion of the common law position will become unnecessary and every case will be satisfactorily disposed of under the Act of 1935.

J. A. Jolowicz.

TORT—OCCUPIERS' LIABILITY—INDEPENDENT CONTRACTOR

Green v. *Fibreglass Ltd.* [1958] 3 W.L.R. 71, decided by Salmon J. at Newcastle-upon-Tyne Assizes, is a case on the common law liability of an occupier for injuries suffered before the Occupiers' Liability Act, 1957, came into force on January 1, 1958. But it is of interest and importance as the only direct authority on the effect, before 1958, of the House of Lords' decision in *Thomson* v. *Cremin* (decided in 1941, reported *sub nom. Cremin* v. *Thomson* in (1941) 71 Ll.L.R. 1, but overlooked by the legal profession and the courts until revealed by Mr. Heuston in the 11th edition of Salmond on *Torts* and reported in [1953] 2 All E.R. 1185 and [1956] 1 W.L.R. 103n).

In the *Fibreglass* case the plaintiff was a charwoman working for, but not the servant of, the occupiers. The relationship was therefore that of invitor to invitee. The occupiers employed independent contractors, reputable and competent electricians, to rewire their offices. Through the negligence of one of the contractors' workmen the switch to an electric fire was faultily and dangerously wired. While attempting to clean the fire, with the switch in the "off" position and the element cold, the plaintiff received severe electrical burns. She sued the occupiers for breach of their duty to use reasonable care to prevent damage from an unusual danger of which they knew or ought to have known (*Indermaur* v. *Dames* (1866) L.R. 1 C.P. 274). The issue was, therefore, whether the occupiers were liable for the negligence of their independent contractors. In *Haseldine* v. *Daw & Son, Ltd.* [1941] 2 K.B. 343 and *Woodward* v. *Mayor of Hastings* [1945] 1 K.B. 174 the Court of Appeal had held in effect that an occupier was not liable for the defaults of his independent contractor if he had used reasonable care in selecting the contractor, exercised reasonable supervision over the work, and used reasonable care to detect dangers existing after the completion of the work (see Winfield on *Tort*, 6th ed., p. 639). But in *Thomson* v. *Cremin* (above) the House of Lords had appeared to accept that an invitor's duty to his invitee was personal to the former in the sense that he

could not get rid of his obligation by entrusting its performance to an independent contractor (see (1954) Cmd. 9305, para. 26). Salmon J. was urged to accept this proposition and not to follow *Haseldine* v. *Daw*. This he refused to do, holding that the decision in *Thomson* v. *Cremin* was not inconsistent with *Haseldine* v. *Daw*, that Lord Wright's observations were *obiter*, that *Haseldine* v. *Daw*, being unaffected, was binding on him and was, in any case, consonant alike with principle, common sense and the whole stream of authority in negligence cases. As no question of supervision or subsequent detection of fault arose on the facts of the *Fibreglass* case, the occupiers had discharged their duty of care by employing reputable and competent experts to do the rewiring, and were accordingly not liable. His Lordship added that there could have been no answer to the claim had it been brought against the contractors.

Salmon J. has thus applied the law as it was found to be by the Court of Appeal in 1941 and as it has been laid down by statute in respect of injuries suffered on or after January 1, 1958—for the Occupiers' Liability Act, 1957, s. 2 (4) (b) reverses Lord Wright's proposition in *Thomson* v. *Cremin*. The Law Reform Committee had accepted reasonable care as the measure of the occupier's duty and accordingly rejected the strictness of *Thomson* v. *Cremin*. Salmon J. has done precisely the same without the help of a statute, and he might have prayed in aid the remarks (entirely *obiter*) of Denning L.J. in *Riden* v. *Billings* [1957] 1 Q.B. 46, 54: "the plaintiff's advisers thus recognise, quite rightly, I think, the authority of *Haseldine* v. *Daw & Sons Ltd.* I see nothing inconsistent with it in *Cremin* v. *Thomson*."

In *Wells* v. *Cooper* [1958] 3 W.L.R. 128, decided a week or so before the *Fibreglass* case but not reported until later, counsel addressed an argument to the Court of Appeal based on the assumption of a general liability of an occupier for his independent contractor, but his argument was rejected as fallacious without any consideration of the authority of *Thomson* v. *Cremin*. In *Wells* v. *Cooper* no independent contractor had in fact been employed and the case (one of interest and some difficulty) decided that an occupier is not in breach of his duty, in relation to a trifling domestic replacement such as fitting a new door knob, merely because he "does it himself." Nor does *his* duty become greater merely because he chooses to employ an independent contractor. But some kinds of work involve such highly specialised skill and knowledge that an ordinary occupier would fail in his duty if he undertook the work himself. Presumably electrical rewiring, as in the *Fibreglass* case, would be in the latter category.

It must be stressed that after January 1, 1958, an occupier would not be liable for his independent contractor "if in all the circumstances he had acted reasonably in entrusting the work to an independent contractor and had taken such steps (if any) as he reasonably ought in order to satisfy himself that the contractor was competent and that the work had been properly done": Occupiers' Liability Act, 1957, s. 2 (4) (b). *Thomson* v. *Cremin* is dead, and Salmon J. has said it was never alive.

F. J. Odgers.

PASSING OFF—TRADE MARK—USE OF TRUE MAKERS' NAME

The plaintiff company in *Baume & Co. Ltd.* v. *A. H. Moore Ltd.* [1958] 2 W.L.R. 797 carried on the business of the sale of watches and owned a registered trade mark "Baume." In this case they sought an injunction restraining the defendant company from infringing their trade mark and from passing off another manufacturer's watches as the plaintiffs' watches. The defendants also sold watches and these were marked "Baume & Mercier, Genève," being manufactured by a Swiss company of that name. Danckwerts J. dismissed the application on both grounds, [1958] Ch. 137, and the plaintiffs appealed. The Court of Appeal unanimously reversed the learned judge's decision, though dissenting from his view of the law in part only.

On the issue of passing off the judge had decided that to prove, as the defendants had, honest user of the true makers' name provided a defence, though on the facts he found a probability of confusion in respect of the English sales of the watches. The Court of Appeal disagreed. Romer L.J. piously had recourse to the judgment of Romer J. in *Joseph Rodgers & Sons Ltd.* v. *W. N. Rodgers & Co.* (1924) 41 R.P.C. 277. The law lays down two prohibitions. First, no man shall carry on his business so as to represent it as the business of another. Secondly, no man shall describe or mark his goods so as to represent that they are the goods of another. Now to the first rule there is an exception. A man may carry on his business in his own name, even if that causes confusion with another's business, provided he is honest and not fraudulent. But the second rule is a flat prohibition without qualification, and this rule was that applicable to the case. Here it is the deception itself that is obnoxious to the law; the intent to deceive need not be proved nor is the honest use of a name a ground of defence. The court confirmed the judge's finding that the evidence showed an appreciable risk of confusion and therefore an injunction was granted on the issue of passing off.

That was enough to dispose of the case, but the court then turned to the trade mark aspect of the matter on which they delivered their "provisional views," leave to appeal to the House of Lords being later given. First, they considered that the addition of words to the initial word "Baume" registered as a trade mark did not prevent infringement, for section 4 of the Trade Marks Act, 1938, prohibits not only exact reproduction but also a mark so nearly resembling that registered "as to be likely to deceive or cause confusion in the course of trade." But the defendants were able to rely on the statutory defence under section 8, which protects the bona fide use by a person of his name or any bona fide description of the goods. It was argued that the terms of the section only allowed a defence based on bona fide use of his name as a trade name as distinct from using it as a trade mark. The court found no evidence for such a restrictive interpretation in the words of the section, and little outside it, and so rejected the argument. The judgment concludes with a robust rejection of the notion of "constructive dishonesty." The fact of resemblance and confusion is one thing, the trader's state of mind is another. Good faith protects the trader even though his conduct may have seriously injured his neighbour.

Tensions in this branch of the law seem to echo many old differences of law and equity. The judgment itself is an attractive exercise in legal reasoning, both within its own context and in a wider aspect as a specimen of judicial policy. It is interesting to see strict liability enforced in the field of case law while a statutory exemption is construed liberally in favour of a negligent but honest trader.

D. E. C. Yale.

CONTRACT—RESALE PRICE MAINTENANCE—NOTICE OF CONDITIONS

The "ticket" cases which have produced so much injustice in the law of contract are rapidly infecting other areas of the law. First tort—in *Ashdown* v. *Samuel Williams & Sons, Ltd.* [1957] 1 Q.B. 409, discussed in [1957] C.L.J. 39—and now the Restrictive Trade Practices Act, 1956. In *Goodyear Tyre and Rubber Co. (Great Britain), Ltd.* v. *Lancashire Batteries, Ltd.* [1958] 1 W.L.R. 857; [1958] L.R. 1 R.P. 22, the Court of Appeal interpreted section 25 of that Act in accordance with "ticket" principles.

The section allows a manufacturer to enforce resale price conditions against a retailer with whom he has no contract, if the latter obtained the goods "with notice" of the conditions. In this case the defendant retailers had sold tyres at less than the

resale price specified by the plaintiff manufacturers. The only notification of the price condition which the retailers had received was a circular sent to them by the British Motor Trade Association, which set out a list of names of manufacturers, including that of the plaintiffs, and purported to give notice on behalf of each of them that resale price conditions were attached to their products. Details of the exact conditions for each product could, it said, "be obtained on application to the manufacturer . . . concerned." The plaintiffs did print a trade price list which set out the details of their conditions. It was over thirty pages long, and, as Lord Evershed M.R. remarked, "a full comprehension of the price conditions is quite a complex subject."

Upjohn J., in the court below, had held that section 25 did not permit the plaintiffs to succeed because the enforcement of a restriction necessitated full knowledge in the retailer of the actual terms of the condition attaching to the goods in question. A decision by this learned judge is of special interest, of course, because he is one of the High Court judges who sit in the new Restrictive Practices Court, and is, therefore, in an unusually favourable position to observe the operation of all the different parts of the Act. It is interesting that the Court of Appeal agreed with his rejection of the patent cases as a guide to the meaning of "notice." A man who acquires a patented article for resale is bound by the conditions imposed by the patentee, if he knows that conditions exist (see *Dunlop Rubber Co., Ltd.* v. *Longlife Battery Depot* [1958] 1 W.L.R. 1033); but this "special proprietary right" was not thought to be relevant here. Nevertheless, the Court of Appeal allowed the appeal, holding that it is sufficient if the retailer knows only that there is a discoverable price condition. "The word 'notice' to a lawyer, in my judgment," said Lord Evershed, "means something less than full knowledge." All three Lords Justices pressed into service the ticket cases; Romer L.J. obtained "special assistance" from the well-known decision in *Thompson* v. *L. M. & S. Ry.* [1930] 1 K.B. 41. After all, they suggested, had there been a contract between these parties, the ticket cases showed that the trade price list would have become a term in that contract. The effect of section 25 was to make the condition enforceable "as if" the retailer were party to the contract. Therefore "notice" could be interpreted in the wider sense. The retailer knew here that a restriction existed and he knew where to look for it. The ticket cases proved that this could be notice. Where was the line to be drawn if this result were rejected?

Such reasoning brings to section 25 a very different approach from that taken by Upjohn J. and by Harman J. in *County Laboratories, Ltd.* v. *J. Mindel, Ltd.* [1957] Ch. 295. Harman J. was particularly careful to construe narrowly this "section limiting the freedom of trade," and refused to import any doctrine of "constructive notice" into it. Romer L.J. agreed that such a doctrine would be inappropriate here. But neither he nor his brethren saw fit to limit the scope of the section on any grounds of policy, or, indeed, to discuss the policy of the Act at all. The mechanical argument which notes that section 25 treats the retailer "as if" he were a contracting party and so proves that the ticket principles of contract can be used to interpret "notice" is, with respect, less than convincing. The section certainly does not say that the retailer may be thought of as a notional party in order to construe the section. Judges with a different policy would (and did) find that only after receipt of clear notification of the terms which were to apply to these goods could the retailer be treated as such. At least, they would be able to avoid the absurd situation of the retailer being set a complicated thirty-page sum by the manufacturer.

A different decision would indeed encounter difficulties. But it is to be wondered whether they would necessarily be more terrifying than the present prospect that the law of resale price maintenance is about to see decisions like *Penton* v. *Southern Ry.* [1931] 2 K.B. 103; *Sugar* v. *L. M. & S. Ry.* [1941] 1 All E.R. 172; and *Spurling (J.), Ltd.* v. *Bradshaw* [1956] 2 All E.R. 121.

Lastly, the status of the British Motor Trade Association was apparently agreed on all sides. It had acted as agent for each named manufacturer. All these companies sent out their notices through the Association. It is interesting to speculate whether there was not some "arrangement" registrable under section 6 (1) of the Act, or even some arrangement involving the "collective enforcement" prohibited by section 24 (1) and (5). Section 25, validating "individual" enforcement, is usually thought of as the political *quid pro quo* for section 24 which outlaws collective enforcement of resale price conditions. But if each manufacturer operates his "individual" enforcement through the medium of a trade association, the position is surely not far removed from those systems of "policing entire industries" condemned by the Lloyd-Jacob Committee (1948, Cmd. 7696) and the majority report of the Monopolies Commission (1955, Cmd. 9504). The present decision by the Court of Appeal enlarges the loopholes in an Act designed to break up those systems, and makes it easier for a group of enforcers, acting "individually," to form a most effective police

force by using the central trade association. In such a case, surely the court would have been assisted in its interpretation of what this particular statute meant in this context by the word " notice " more by a consideration of the policy and operation of the whole Act than by voluntary submission to a severe attack of ticketitis.

K. W. Wedderburn.

CONTRACT—INNOCENT MISREPRESENTATION—RESCISSION

In *Long* v. *Lloyd* [1958] 1 W.L.R. 753 the Court of Appeal (Jenkins, Parker and Pearce L.JJ.) were again asked to consider the circumstances in which the right to rescission of a contract for innocent misrepresentation is lost after the contract has been executed. Pearce L.J.'s description of the question as " somewhat vexed " is temperate. The so-called rule in *Seddon* v. *North Eastern Salt Co., Ltd.* [1905] 1 Ch. 326, and the general proposition in *Angel* v. *Jay* [1911] 1 K.B. 666, that innocent misrepresentation is no ground for the rescission of a contract after completion, have been repeatedly condemned by Denning L.J. (as he then was) and his Lordship has expressed the view that the majority of the Court of Appeal in *Solle* v. *Butcher* [1950] 1 K.B. 671 overruled the relevant ground of decision in *Angel* v. *Jay*. In fact, in *Solle* v. *Butcher* the other member of the majority (Bucknill L.J.) said nothing about the point and the dissentient judge (Jenkins L.J.) accepted *Angel* v. *Jay*. In *Leaf* v. *International Galleries* [1950] 2 K.B. 86 Jenkins L.J. relented to some extent but Lord Evershed M.R. expressly kept the point open.

Long v. *Lloyd* does nothing to remove the difficulties. Counsel's able argument did not suffice to resolve the court's doubts on the question of principle. Their Lordships were satisfied that it was unnecessary (as it was in *Leaf's* case) to decide the general point because they were satisfied that the plaintiff's right to rescission was lost on other grounds. The value of *Long* v. *Lloyd* lies in the Court of Appeal's express acceptance and approval of Denning L.J.'s particular *ratio decidendi* in *Leaf's* case. It will be remembered that after referring to sections 11 (1) (*c*) and 35 of the Sale of Goods Act, 1893, Denning L.J. said: " an innocent misrepresentation is much less potent than a breach of condition; and a claim to rescission for innocent misrepresentation must at any rate be barred when a right to reject for breach of condition is barred." In a contract for the sale of goods, if the buyer has " accepted " the goods within section 35, so that it is too late for him to reject them for breach of condition, then, even if *Angel* v. *Jay* is no longer good law, it is too late for rescission for innocent misrepresentation.

In *Leaf's* case the buyer had retained the picture he had bought as a Constable for some five years, without intimating to the seller that he had rejected it. He had thus accepted it within section 35.

In *Long* v. *Lloyd* the plaintiff bought a secondhand lorry on the faith of material representations as to its general first-class condition, its speed, and its fuel consumption. He had been given a trial run on which he had noticed certain minor defects not relevant to his subsequent claim. He then drove the lorry from the place of delivery, Hampton Court, to Sevenoaks, and on the next day he took it into use in his business by driving it to Rochester and back with a load. By this time the dynamo had ceased to function, an oil seal was leaking, a wheel was cracked, and the lorry had used eight gallons of fuel for a journey of forty miles. The plaintiff telephoned the seller and complained. The seller agreed to pay half the cost of a reconstructed dynamo. On the following day the plaintiff, knowing all that he did about the condition and performance of the lorry, sent it on a business trip to Middlesbrough. The next night it broke down. The plaintiff demanded the return of his money against the return of the vehicle. It was held that, on any view, he had accepted the lorry before he purported to reject it. The sending of the lorry to Middlesbrough was, in all the circumstances, a final acceptance for better or worse and conclusively extinguished any right of rescission that may have remained to him after completion of the sale. So far as time is concerned, *Long* v. *Lloyd* bears no resemblance to *Leaf's* case for the plaintiff had had the lorry for only a few days. But his conduct during that period amounted to "acceptance" and on a strict application of Denning L.J.'s reasoning in *Leaf's* case he had lost his right of rescission—if any.

As in *Leaf's* case, there is no mention in *Long* v. *Lloyd* of that part of section 11 (1) (*c*) of the Sale of Goods Act, 1893, which precludes the rejection of "specific goods the property in which has passed to the buyer." The courts have been as successful in avoiding this as they have been in eluding the toils of *Seddon* v. *North Eastern Salt Co., Ltd.* and of *Angel* v. *Jay*.

F. J. Odgers.

CONTRACT—RESTRAINT OF TRADE—TERMINABILITY

In *Kores Manufacturing Co., Ltd.* v. *Kolok Manufacturing Co., Ltd.* [1958] 2 W.L.R. 858 the Court of Appeal affirmed, though with a different emphasis, the decision of Lloyd-Jacob J., noted above in [1958] C.L.J. 20, that the contract in question was void as being in restraint of trade.

The two companies agreed in 1934 that neither would employ, without the other's consent, any person who, during the five previous years, had been employed by the other. Both produced carbon papers and ribbons and the court assumed the existence of trade secrets and confidential information. The agreement was made in contemplation of the plaintiffs moving their factory next to the defendants' site, but in 1955 the plaintiffs moved away, and now sought a declaration that the agreement was valid, and an injunction to restrain the defendants from employing the plaintiffs' former chief chemist and other staff.

The agreement covered all employees, however unskilled, and for a uniform period. Employers taking a parallel promise from individual employees could hope to sustain a period of five years in few cases, and Lloyd-Jacob J. was further impressed by the "public mischief" which might result from this agreement—particularly after the plaintiffs had moved away.

The court construed the agreement as being *for* the protection of "the adequacy and stability of their respective complements of employees" and of confidential information *against* the "unimpeded secession of employees" and divulging of such information. Between the parties the promise might appear commercially reasonable, especially as the consideration for it was a reciprocal promise. But the promise was assessed from the standpoint of the promisee, and its protection was found more than just adequate—the period of five years was held to be grossly excessive, and even six months would have been unreasonable. *Sed quaere*, whether it was unreasonable for the promisor.

Though leaving open the question whether employers contracting amongst themselves could achieve a result impossible by contracts with individual employees, the court clearly had in mind that it was the companies' employees who might suffer from these restrictions—though eighteen similar factories operated, including four in the London area. The court did not consider whether the contract was unreasonable in the public interest, nor rule finally on the submission that a contract of this nature would only be unreasonable to the public if involving a monopoly. But little doubt was left that an employer could not, to ensure a stable staff, extract a valid promise from individual employees not to work for a competitor.

The parties accepted that the contract, though not expressly determinable, was determinable on reasonable notice, to be assessed when notice was given; but they disputed whether six or twelve months was in the circumstances the right period. Without deciding, the court doubted whether the five-year prohibition left

room for an implied term that the agreement could be dissolved on reasonable notice. On this contract no distinction could be drawn between employees who left before and after such a notice, and the employees were not contractually bound by the restraint. The effect of the court's doubt appears to be either to equate in practice the period of reasonable notice with the period of restraint chosen by the parties and approved by the court as reasonable, or to mean that this sort of contract is not determinable, unless express provision is made. The former might seem the more likely eventual result.

G. Slynn.

CONTRACT—SHIP—PURCHASE WITH NOTICE OF CONTRACT OF CHARTER

The *Strathcona Case* [1926] A.C. 108 has at last met its Waterloo (or, if it should be a watery grave, one might say its Trafalgar) at the hands of Diplock J. in *Port Line, Ltd.* v. *Ben Line Steamers, Ltd.* [1958] 2 Q.B. 146. The question how far contractual obligations can be made to run with property other than land is of such wide interest that no apology is made for saying comparatively little about the particular facts of the new case. Just as in the *Strathcona* case, it concerned a ship which, while subject to an unexpired contract of charter, was sold to purchasers who well knew that the contract existed and made their purchase on the footing that it would be respected. In both cases, likewise, the ship was requisitioned by the Crown (in the former case, during the First World War; in the latter case, during the Suez crisis of 1956); the purchasers then claimed that the contract of charter was frustrated; and this argument was rejected on the ground that the interference was only temporary. In both cases, finally, the purchasers resorted to the wider argument that they could in any case disregard the contract on the ground that they were not parties to it. In 1925, in the *Strathcona* case, a powerful Judicial Committee of the Privy Council held that they could not. In 1958 Diplock J. has held that they can, being clearly of opinion that the *Strathcona* case was wrongly decided. The point in fact determined by Diplock J. was that the charterers were not entitled to any part of the compensation money paid to the purchaser by the Crown in respect of the requisition under the Compensation (Defence) Act, 1939. This raised a number of other interesting questions, but it must suffice to say here that the learned judge held that even if the *Strathcona* case was rightly decided, the claim against the purchasers still failed because, although they knew of the contract of charter, they did not know its precise terms; and, furthermore, the

utmost that the charterers could claim was a right in equity to restrain the purchasers from using the ship otherwise than in accordance with the contract of charter, and no injunction against the purchasers could avail against requisition by the Crown. Being thus well furnished with secondary reasons for rejecting the claim, the learned judge must be given all the more credit for dealing so squarely with the primary matter of the *Strathcona* case in his most illuminating judgment.

The land law has long benefited from allowing contracts to create equitable interests which can bind third parties purchasing with notice, notably in the case of contracts for sale or lease (estate contracts) and restrictive covenants. Why should not the same principle apply to ships, or for that matter any other property? Perhaps the theoretical answer is that purchasers have a right to expect that the incumbrances to which they may be liable shall be few and familiar. In the land law they are strictly defined—leases, easements, restrictive covenants, etc.—but in the law of contract the possible obligations are limited only by the imagination of the contracting parties. If any sort of contractual obligation could run with property the distinction between contractual and proprietary rights would virtually disappear. Another and more practical answer is that the plaintiff has a sufficient remedy in damages by suing the original owner, who contracted with him, and who by parting with the property has put it out of his power to perform the contract. But this remedy is not always sought (it was not sought in the *Port Line* case) and judges may naturally be loth to exonerate purchasers who have purchased with their eyes open. The resulting vicissitudes in the case law are a fascinating commentary on the possibilities of judicial legislation.

Few propositions glide more easily from the tongue, or fall more smoothly on the ear, than the famous statement by Knight Bruce L.J. in *De Mattos* v. *Gibson* (1859) 4 De G. & J. 276: "Reason and justice seem to prescribe that, at least as a general rule, where a man, by gift or purchase, acquires property from another, with knowledge of a previous contract, lawfully and for valuable consideration made by him with a third person, to use and employ the property for a particular purpose in a specified manner, the acquirer shall not . . . use and employ the property in a manner not allowable to the giver or seller." This was the wide doctrine which was approved and applied, as a principle of equity, in the *Strathcona* case. The only trouble about it was that it had never been heard of before 1858, and could not (outside the law of land) co-exist with the fundamental rule that contracts do not bind third parties. It is interesting to trace its career, as Diplock J. did,

during its lifetime of exactly a hundred years. It may be said to be one of the illegitimate offspring of *Tulk* v. *Moxhay* (1848) 2 Ph. 774 which has succeeded in clinging to life for a good deal longer than the rest of the family.

Tulk v. *Moxhay* established a new equitable interest in land, the right to enforce (by injunction) a restrictive covenant against later owners of land which the original covenantor had undertaken not to use in some particular way. This unsettled some vital parts of the law of property and of contract and it was not for nearly eighty years—until *L. C. C.* v. *Allen* [1914] 3 K.B. 642—that the new doctrine was licked into shape and some of its more extravagant offshoots were pruned. In particular, the Court of Appeal then firmly rejected the idea that mere notice of a contract affecting property was enough to require a later purchaser to respect that contract, and it has always since been clear that cases such as *Catt* v. *Tourle* (1869) L.R. 4 Ch. 654 were unsound. The whole basis of Knight Bruce L.J.'s generalisation was thus cut away, and the net result of *Tulk* v. *Moxhay* was a set of strictly limited rules relating to land only. The upheaval caused by the judicial legislation of 1848 should then have been over. But in 1926, contrary to all probability, Knight Bruce L.J.'s doctrine (in Diplock J.'s words) "rose from the grave in the *Strathcona* case"; it was expressly approved by a Judicial Committee which included Lords Haldane, Wrenbury and Blanesborough; *Catt* v. *Tourle* was singled out for favourable mention; and the current of recent legal history was put into reverse. How one wishes that individual opinions could have been given; for the single judgment was delivered not by one of the English authorities on equity but by Lord Shaw. No suggestion was made that ships were subject to any special rules as contrasted with other classes of personal property. The only new element introduced by the Judicial Committee was the proposition that the purchaser with notice took as a constructive trustee; but since this type of constructive trustee was *sui generis* (as Diplock J. observed), this made the matter no less baffling. "Those whose memory enables them to go back to the time when that case was decided will remember that some of the observations made in relation to constructive trustees and the running of restrictive covenants with personalty were regarded by the profession as novel if not revolutionary" (*per* Lord Greene M.R. in *Greenhalgh* v. *Mallard* [1943] 2 All E.R. at p. 239). It was, therefore, a fitting occasion for the learned judge to take advantage of the rule that decisions of the Privy Council are not binding upon other courts.

The dogma of the non-liability of third parties is now again re-established. But one may be sure that it will often be under

attack, and will continue to bring to light deep-seated differences in judicial temperament. Indeed, a successful attack is at present being consolidated in the law relating to contractual licences for the use of land, in which *Errington* v. *Errington* [1952] 1 K.B. 290 is the *Tulk* v. *Moxhay* of our own generation. Here, as in the case of restrictive covenants, the new equitable interest invented by the Court of Appeal can be said to be confined to the law of land, which may improve its chances of survival. The doctrine of *Tulk* v. *Moxhay* has had the good fortune (if the phrase may be pardoned) never to come before the House of Lords, and though Challis predicted that it was destined "to have its wings clipped whenever it shall come before that august tribunal," it has had time to establish itself firmly in the lower courts, subject only to such wing-clipping as learned judges like Diplock J. have rightly inflicted. Restrictive covenants proved to be a valuable instrument for controlling the development of land. It is doubtful if contractual licences have equally good claims; at any rate, *Errington* v. *Errington* might well have rested on familiar principles of equity (see 68 L.Q.R. at p. 350; 69 L.Q.R. at p. 479) instead of having a new interest invented in its honour. The protagonist of that new interest in the Court of Appeal was Lord Justice Denning (as he then was), and it is significant that when discussing it in *Bendall* v. *McWhirter* [1952] 2 Q.B. 466, at pp. 481–482, he mentioned with favour both *De Mattos* v. *Gibson* and the *Strathcona* case, as well as some other dubious by-products of *Tulk* v. *Moxhay*, and treated them as good law. The connection between the *Strathcona* problem and the licence cases is close, and it is most interesting to see the forces unleashed in *Tulk* v. *Moxhay* losing ground in one field while they are gaining it in another.

H. W. R. Wade.

Lease—Forfeiture—Denial of Title in Pleading

Forfeiture clauses have been so much mitigated in their effect that it is striking to observe the vitality of a rule of feudal origin, and of technical character, which can bring about the undeserved forfeiture of a lease—a forfeiture, furthermore, against which the court can give no relief. It is an ancient rule that a lease is forfeited if the tenant denies the landlord's title. How fatally this can work is shown by *Warner* v. *Sampson* [1958] 1 Q.B. 404. The same case illustrates another and no less remarkable fact, that the forfeiture can be precipitated by a mere mistake in pleading. It is not often that a case can be lost on such a technicality nowadays;

but this example could be set beside any from times long ago when the remorseful pleader had to make the confession " j'ai faillé."

The landlord had instituted an action for possession against the executors of the deceased tenant, alleging non-payment of rent and breaches of covenant. A defence was settled by counsel on behalf of one of the executors (the other taking no part) and was duly delivered. This defence admitted that the defendant was executrix and denied the breaches of covenant, and then concluded on the usual comprehensive lines: " Save and except for the admission herein contained this defendant denies each and every allegation in the statement of claim as if the same were specifically set out and traversed *seriatim*." The landlord seized the chance to reply that, since the defence did not expressly admit the lease and the landlord's title (which had been set out in the statement of claim), the general traverse denied them, and that the lease was forfeited. Ashworth J. upheld this contention; and he held, furthermore, that the court had no jurisdiction to give relief since the forfeiture was brought about by operation of law and not " under any proviso or stipulation in a lease," and therefore fell outside section 146 of the Law of Property Act, 1925. It was also held that the joint interest of the executors was forfeited by a denial of title committed by one of them only. The argument that it was a " disclaimer " within the definition of " conveyance " under sections 2 (2) and 55 of the Administration of Estates Act, 1925, was rejected on the ground that it is only by loose use of language that such forfeiture can be called disclaimer. Had it been otherwise, both executors would have had to participate before it could be effective under the latter Act.

This is not the first modern case of forfeiture resulting from inadvertent pleading. In *Kisch* v. *Hawes Brothers, Ltd.* [1935] Ch. 102 a tenant for life made an irregular lease and after her death her successor in title sued for possession. The tenants made the fatal mistake of merely pleading their possession under R.S.C., Ord. 21, r. 21 (as if they were putting an adverse title in issue), rather than pleading that they were in possession under the lease. Farwell J. held that this was a denial of the landlord's title and caused a forfeiture; and although he gave leave to amend the defence, he held that no amendment could undo the damage done when the defective defence was first delivered. The rules of court were promptly amended (by S.R. & O., 1936, No. 329) so as to warn tenants against pleading their possession merely, against their own landlords, and thus casting themselves into this trap. This amendment did not, of course, help the tenant in *Warner* v.

Sampson, for there his counsel had traversed the landlord's title in a much more direct fashion.

There is a clear case here for advocating a small amendment of the law, and for including this among the other types of forfeiture against which the court may grant relief under section 146 of the Law of Property Act, 1925. Forfeiture by denial of the lord's title may have been a suitable rule for feudal tenure, but in modern life it is surely a quite excessive penalty for a technical slip, for which the tenant himself is most unlikely to be personally to blame. The court has jurisdiction to grant him relief against the gravest and most deliberate breaches of covenant under section 146, and against default in payment of rent under the corresponding equitable jurisdiction. Obviously there should be jurisdiction to relieve against denial of title, and the merits or demerits of the case could then be taken into account by the court in deciding whether to allow the tenant to redeem the misdeeds of himself or his advisers. Alternatively, and more radically, this type of forfeiture might be abolished altogether; for the important principles which govern disputes as to title between landlord and tenant are sufficiently protected by the rule that they are estopped from denying the facts essential to their relationship. The feudal origins of forfeiture for denial of title, and the texts of Glanvill and Bracton mentioned by counsel in *Doe* d. *Ellerbrock* v. *Flynn* (1834) 1 C.M. & R. 137, are interesting to historians but can hardly justify the rule to modern eyes. It is presumably too late for equity to invent a new head of relief, as might well have been done if such cases had been common in earlier times.

H. W. R. Wade.

CONSTRUCTION OF STATUTE—PRECEDENT

London Transport Executive v. *Betts* [1958] 3 W.L.R. 239 (H.L.) may excusably be passed over by law students because it is a rating case. Nevertheless the dissenting opinion of Lord Denning is of great importance and deserves their attention.

The question at issue was whether a place used by the appellants solely for the purpose of reconditioning their fleet of buses was an "industrial hereditament" entitled to a rating relief. The process of overhaul adopted was thoroughgoing. The incoming buses were taken to pieces and the parts renewed or reconditioned where necessary. The parts were interchangeable and were to such an extent interchanged that it was unusual for even the main part of the body to be re-attached to its original chassis. The emerging bus was a transformed bus. The place undoubtedly was a factory

under the 1901 Act; for "factory" by that Act includes premises used for the purpose of "the altering, repairing, ornamenting or finishing of any article." The principle of the Rating and Valuation (Apportionment) Act, 1928, appears to be that premises primarily or exclusively used as a factory should be classed as an industrial hereditament. Why then should this obvious factory not be so classed?

In the view of the majority, the matter was concluded against the appellants by the interpretation put by *Potteries Electric Traction Co., Ltd.* v. *Bailey* [1931] A.C. 151 upon subsection 2 (*b*) of section 3 of the 1928 Act (as amended). The subsection provides ". . . any place used by the occupier for the housing or maintenance of his road vehicles or as stables shall, notwithstanding that it is situate within the close, curtilage or precincts forming a factory or workshop and used in connection therewith, be deemed not to form part of the factory or workshop . . ." *Bailey's* case decided—perhaps incidentally, for the occupiers succeeded on the major issue—that, in the case of a factory manufacturing vehicle-parts to be used for repairs, an area within the precincts which was used by the occupiers as a paint shop for their own vehicles was not entitled to exemption: because the painting of vehicles was "maintenance" within the meaning of the subsection. "Maintenance" had thus authoritatively been given a somewhat extended meaning. The majority in *Betts'* case held that they were bound by *Bailey's* case to hold that "maintenance" included repair because it included repainting, and that as a matter of law repair could include the entire reconditioning of the buses in *Betts'* case.

There is evidently some awkwardness in the majority's view. The subsection appears to be dealing with a place, not itself a factory, which is included within the precincts of a factory: it is not readily applicable to a place which is a factory in its own right. Moreover, if "maintenance" is to include "repair," the provisions of the 1901 Act regarding repair cannot easily be construed coherently with the provisions of the 1928 Act, though the latter incorporates the former. And to ordinary common sense (if that may have relevance in a rating matter), it does not seem self-evident that the premises as used by the London Transport Executive are aptly described as "used by the occupier for the housing or maintenance of his road vehicles or as stables."

However that may be, Lord Denning preferred to tackle the question in a quite different manner, one which is new and refreshing today, though not without warrant in the older law. Instead of considering subsection (2) (*b*) of section 3 of the 1928

Act in the void, and laboriously spelling out of *Bailey's* case a *ratio decidendi* to bind or blind himself, and applying the subsection so interpreted with a grand and impartial unconcern, Lord Denning was willing to suppose that the Rating Acts might have a coherent purpose and that it might be his judicial duty to discover and implement it.

He attempted to get an understanding of the Acts by "taking an instance which the legislature clearly had in mind"—see his opinion in *Escoigne Properties, Ltd.* v. *Inland Revenue Commissioners* [1958] 2 W.L.R. 336, 347: which may indeed be the best method while the court remains as arbitrarily limited as it is in its inquiry into the purpose of a statute. So doing, he found that the subsection in question, so far from being awkward, was most aptly drafted to exclude from rating relief coachhouses or garages (not being themselves factories) which are incidentally included in the term "factory" by the 1901 Act if within the precincts of a factory. It was equitable as well as reasonable not to give relief in respect of such garages within the precincts when relief would not be given to them outside the precincts. Conversely, garages which were themselves factories—*i.e.*, which were used for repairs and alterations and not merely for the housing and maintenance of vehicles—would (as they should) have exemption from rates whether within or without the precincts of another factory. That is to say, the Acts could be construed as a coherent whole if, and only if, "maintenance" were given a suitably restricted meaning which contrasted it to, rather than confounded it with, "repair." Such a meaning of "maintenance" was not only possible but antecedently appropriate to the context even of the subsection taken by itself.

Lord Denning then continued (pp. 263–264):

> "But it is said that there is a decision of this House which prevents your Lordships adopting this construction, namely, the decision about the paint shop in *Potteries Electric Traction Co., Ltd.* v. *Bailey*. That is, to my mind, a decision on the particular facts of the paint shop and nothing else. The decision may be binding on your Lordships if there is another such paint shop anywhere, but it is not in my opinion binding for anything else. If your Lordships were to elevate that particular precedent into a binding decision on the meaning of 'maintenance' you would, I believe, carry the doctrine of precedent farther than it has ever been carried before . . . It seems to me that when a particular precedent—even of your Lordships' House—comes into conflict with a fundamental principle, also of your Lordships' House, then the

> fundamental principle must prevail . . . It would, I think, be a great mistake to cling too closely to particular precedent at the expense of fundamental principle. Here every principle of construction requires this House to limit the word 'maintenance' to ordinary maintenance, and not to extend it to the vast repairs and reconditioning and reassembling done in this depot. It is, to my mind, clearly an industrial hereditament entitled to be derated."

Si sic omnes. The contrast made between principle and particular precedent is most apt and, if it may respectfully be said, very much to be commended. It is not the construction of statutes only which will benefit from some reasonable attention being given to principle: indeed principle is unlikely to have adequate application there until the court frees itself from the arbitrary limits now set to its enquiry in this field. The method approved by Lord Denning has a more immediate and more fruitful application in the field of judge-made law. That law, the general law of the land, greatly and urgently requires an appropriate court of last instance, one willing to assume direction of, and responsibility for, the law. Such a task can be performed only by a court which is persuaded that there actually exist principles of and in the law which can keep the law within the bounds of coherence and sense. To discover those principles the court, like Lord Denning, must penetrate beyond the slavish doctrine of the particular precedent, a relatively recent and, as now applied, an absolutely irrational, self-contradictory and destructive invention of the House of Lords. It is most heartening to note that the newest recruit to the House is willing to treat the doctrine with the consideration which it has long deserved.

C. J. Hamson.

RANULF DE GLANVILL IN YORKSHIRE *

(with an Excursus on Little Abington, Cambs.)

S. J. Bailey

§ 1. The Sheriffwick

Glanvill, as we have seen, held office as sheriff of Yorkshire during the two periods 1163–1169 and 1175–1189.[1] Throughout both periods it is he who, according to the Pipe Rolls, renders the account of that sheriffwick. During the second of these periods, however, there is reason to believe that he did no such thing. In the year 1177, the Pipe Rolls say outright, with respect to another county, that he accounts by the *verumdictum* of "Reiner his steward" in respect of the past three years[2]; and although they do not speak of Reiner, or indeed of any other, as his deputy when accounts are rendered for Yorkshire, there is little doubt that Glanvill employed Reiner to act for him as sheriff in that county also. Indeed, Glanvill as sheriff of Yorkshire could hardly appear otherwise than by deputy when presenting his accounts at the exchequer where Glanvill the Justiciar presides.[3]

This Reiner, often described simply as Reiner the steward (*dapifer*) of Ranulf de Glanvill,[4] was in fact the Reiner de Waxham (a vill in Norfolk) who held lands in East Anglia.[5] There seems to

* This article is a continuation of "Ranulf de Glanvill and his Children" [1957] Camb.L.J. 163–182. The following abbreviations are used: E.Y.C. (*Early Yorkshire Charters*); Monasticon (Dugdale's *Monasticon Anglicanum*); N.S. (Pipe Roll Society's publications, new series); P. & M. (Pollock and Maitland, *History of English Law*); P.R.S. (Pipe Roll Society's publications, first series); Plac.Abr. (*Placitorum Abbreviatio*); R.C.R. (*Rotuli Curiae Regis*, ed. Palgrave); Red Book (*Red Book of the Exchequer*).

1 [1957] Camb.L.J. 163–164.

2 26 P.R.S. 123 (s.t. Farm of Westmorland). Thereafter Glanvill held the Farm of Westmorland beneficially, see [1957] Camb.L.J. 165, n. 13. See W. A. Morris, *Medieval Sheriff*, 179–180, for the hereditary shrievalty of Westmorland in the 13th century.

3 As regards the problem of exchequer control when high curial officials served as sheriffs and perhaps also as itinerant justices in their own counties, see Morris, *op.cit.*, 104, 114. As regards stewards, and their personal liability when accounting on their lords' behalf at the exchequer, see H. G. Richardson in 21 N.S., p. xciv. For Reiner as deputy, see *ibid.*, p. xciii, and J. H. Round in 34 P.R.S., p. xxxii.

4 *e.g.*, 26 P.R.S. 123. The same year (1177) he is described in a Yorkshire entry as one of Glanvill's servants or serjeants: *ibid.* 81.

5 4 E.Y.C., pp. xxxi, 128. Glanvill gave him the manor of Upton (Norfolk): see Farrer, *Honors and Knights' Fees*, iii, 435.

be no evidence that he held any Yorkshire land, apart from a toft in Doncaster (rented at 12d. per annum) which he acquired perhaps as a resting place when travelling there on his master's business.[6] Yet, although the Pipe Rolls of the exchequer ignore him as an underling year after year, contemporary Yorkshire charters give a different picture of his importance. When he witnesses a charter in Yorkshire he is high in the list of witnesses and is "sheriff" (*vicecomes*),[7] and this even when Glanvill is a witness with him.[8] Moreover, it seems clear that he presided, as though sheriff, in the Shire Court; for one of these charters, a concord dated 1184, recites that it was made in the county court at York "*coram* Reiner, steward of Ranulf de Glanvill, then sheriff of Yorkshire, and the barons of the lord king who were then present there."[9]

§ 2. The Honour of Richmond

During the years 1171 to 1183, Glanvill as Keeper of the Honour of Richmond, was holding another important administrative office centred in Yorkshire.[10] Here again, it seems, Reiner acted as his deputy; for, at the end of his first year of office, when he ought to account to the exchequer (but does not) for the year's issues of the honour, it is Reiner who comes on his behalf.[11] This honour had fallen into the King's hand on the death of Conan, earl of Richmond and duke of Brittany, whose ancestors had held it since the Conquest. When earl Conan died in the year 1171, his daughter and sole heiress, Constance, was already betrothed to Geoffrey, the King's son; and she ultimately married him in 1181.[12] Ordinarily,

[6] See 2 E.Y.C. 336 (no. 1010) for the charter which granted him this toft. The date assigned to it is *circa* 1180–1196. When in Glanvill's company or when acting as his deputy, he presumably enjoyed official perquisites of hospitality (*post*, p. 188).

[7] *e.g.*, 2 E.Y.C. no. 986; 3 E.Y.C. nos. 1412, 1620, 1744 (here another witness is "Master Peter, brother of the sheriff"); 4 E.Y.C. p. 128 (here he ranks next after the King's justices in the list of witnesses and is "sheriff"); 5 E.Y.C. nos. 148, 224. *Cf.* 1 E.Y.C. no. 610, and 5 E.Y.C. no. 216, where he is simply "steward of Ranulf de Glanvill." The approximate dates assigned to these charters range from 1175 to 1189.

[8] *e.g.*, 3 E.Y.C. no. 1837; 5 E.Y.C. nos. 263, 335. Here the approximate dates range from 1184 to 1189. See also footnote 48, *post*.

[9] 3 E.Y.C. no. 1779.

[10] The first entry of this in the Pipe Rolls is 16 P.R.S. 117; the last is 32 P.R.S. 56–58.

[11] 16 P.R.S. 117: "Randulf de Glanvill concerning the issues (*de exitu*) of the honour of earl Conan by *verum dictum* of Reiner his servant. . . . In the treasury £62. 4. 5; but he has not rendered account." See also *Red Book*, p. 50, where, in that year, Glanvil does not render account (of its scutages, *semble*) "because he cannot yet know the number of Knights of the same honour." In 1177, Glanvill's accounts for the honour include moneys for cattle, etc., and corn *de prisa servientum suorum* (*cf.* W. A. Morris, *Medieval Sheriff*, 115), who include Reiner and Hamo de Valeines (possibly a relative of Glanvill's wife): 26 P.R.S. 81.

[12] 4 E.Y.C., p. xi and Ch. II.

the marriage of an heiress put an end to her lord's control over her lands; yet Glanvill remained *custos* of the honour, accounting for its revenues at the exchequer, for two further years.[13] Soon afterwards Geoffrey died, and Constance was a widow with an infant son—the ill-fated Arthur who, as many thought, had greater right to the crown of England than had King John, his uncle.[14]

With these events, however, and the obscure history of the honour whilst John was King, we are not here concerned. From Glanvill's point of view they merely emphasise the importance of his appointment as its Keeper,[15] and explain why, in the Pipe Rolls and other records of his time, we read more often of "the honour of Earl Conan" or "the honour of Brittany" than of "the honour of Richmond" (in Yorkshire) which was its proper name. It was an extensive holding, comprising some 180 knight's fees distributed amongst at least six counties. In Yorkshire it had more than sixty fees, and it extended south to Cambridgeshire with thirty fees (in John's reign the Keeper will account for the rent of Newnham Mill)[16] and to Norfolk with a fraction less than twenty.[17] The detailed accounts of its revenues are to be seen in the Pipe Rolls. They begin with an item of some £430 "for the farms of manors, for the service of drengage tenants, and for the third penny of Ipswich"[18]; and, although this initial figure seldom varies, it is followed by many smaller variable items which seem to show conclusively that Glanvill was keeper rather than farmer of the

[13] *Ibid.*, pp. 108–113, also *ante*, footnote 10. In 4 E.Y.C. 75, Mr. C. T. Clay suggests that, although Glanvill was accounting for the revenues to the exchequer, they were in fact being collected for Geoffrey.

[14] It seems that Hubert Walter had the courage to tell John so: 2 P. & M. 282. Constance did not die until 1201: 4 E.Y.C. 113.

[15] It is possible that Glanvill acted for a while as Constable of the honour before earl Conan died (4 E.Y.C. 57), and possibly again for a short period soon after 1180 (5 E.Y.C. 217). A charter refers to homage done in the earl's court at Richmond at the time when Glanvill was Constable: 5 E.Y.C. 217, no. 307.

[16] 12 N.S. 88; 4 E.Y.C. 114 (where Dr. Clay identified it as the Newnham mill in Cambridge). This was in the year 1199–1200. The rent of the mill amounts to £9 *per annum*. The evidence on which Dr. Clay identified this as the Newnham mill in Cambridge is perhaps somewhat precarious: it is a charter (4 E.Y.C. 6–7 no. 6) whereby, in 1107, Stephen count of Brittany had granted to a French abbey fishery rights in Swavesey (Cambs.) and "the tithe of my mills which are in Cambridge." There is also, however, some supporting evidence in Domesday: it records that Count Alan of Brittany has in the borough of Cambridge in 1086 ten burgesses (ff. 189, 194); also that there are two mills, besides the three which Picot the sheriff has built; that one of those two belongs to the abbot of Ely and the other to Count Alan; and that "those mills yield [each ?] £9 a year" (f. 189). For some notes on the Honour's five hides in Little Abington (Cambs.) see Appendix, *post*, p. 189.

[17] 5 E.Y.C. 9. Its tenants owed service of castle-guard at Richmond Castle: 4 E.Y.C. p. vii.

[18] *e.g.*, 18 P.R.S. 5; 31 P.R.S. 46; 32 P.R.S. 56. For the ancient drengage tenure, see 1 P. & M. 258.

honour.[19] Among the most notable tenants of the honour was Robert fitz Ralph (fitz Ribald), who held of it fees in Yorkshire and in Norfolk.[20] To him, as we have seen, Glanvill gave in marriage his youngest daughter, Helewise.[21]

§ 3. Custos of Wardships and Escheats

Glanvill had the custody also of other Yorkshire lands. In 1166 he has in custody the barony of Everard de Ros [22] and in 1185 he has it still.[23] In 1187, moreover, he has in custody some knight's fees which belonged to one William Painel of Alta Ripa.[24] In each case it seems that the lands have fallen into the King's hand [25] and that Glanvill is holding them, as *custos* or Keeper, on the King's behalf. As sheriff of the county, he was the person likely to be given the charge of lands which fell into the King's hand by wardship or escheat; and such a person was ordinarily expected to render annually to the exchequer the profits those lands produced.[26] One cannot safely assume, therefore, that King Henry, in granting to Glanvill the "custody" of these lands, was giving him a beneficial interest. And even the fact that Glanvill is pardoned, in the Pipe Rolls, certain outgoings in respect of them—the aid for marrying the King's daughter in 1168 [27] and scutage in 1187 [28]—does not necessarily imply, perhaps, that his custody was a beneficial one.

The *Rotuli de Dominabus*, dated 1185, which gives for several counties the results of an inquiry as to the annual value of lands which have fallen into the King's wardship,[29] does not extend to

[19] Thus in 18 P.R.S. 5 (1171–1172) a later item adds an extra 18d. "which he had this year of the farms of manors besides the sum above." There are also items such as "*de pullis venditis* 46s. 8d." (32 P.R.S. 58): and the figure for the earl's Holland Fair varies from year to year—from £76 to £105. See also *supra*, footnotes 11 ("*de exitu*"), 13.

[20] The Middleham Fee comprised some 15 knight's fees, of which 6 were in Yorkshire and 6 in Norfolk: 4 E.Y.C., p. vii; 5 E.Y.C. 13, 297: *Red Book*, 479, 587.

[21] [1957] Camb.L.J. 175.

[22] *Red Book*, 432: Glanvill has in custody this barony which Everard holds [*sic*] of the King. The record is of Everard's feoffments.

[23] 35 P.R.S. (*Rotuli de Dominabus*) 1: the widow is in the King's gift.

[24] 37 P.R.S. 90 (3½ Knight's fees). He was apparently a Norman and should be distinguished from William Paynel of Hooton Paynel (son of Agnes Fossard): 6 E.Y.C. 42 *n*. His scutage for the years 1172 and 1187 is mentioned in the *Red Book*, pp. 53, 62. See also footnote 28, *infra*.

[25] This is clear as regards Everard de Ros (see footnotes 22, 23 *supra*), but less obvious as regards the mysterious William (see preceding footnote).

[26] W. A. Morris, *Medieval Sheriff*, 130, 131.

[27] 12 P.R.S. 89 (the barony).

[28] 37 P.R.S. 90 (the knight's fees). Contrast *Red Book*, 62, which seems to imply that it was paid. This same year an accountant for that same (Galway) scutage in Cornwall is excused the charge upon half a knight's fee "*in perdonis* to Ranulf de Glanvill" (37 P.R.S. 155); so perhaps William Painel de Alta Ripa had held a half fee in Cornwall also.

[29] 35 P.R.S.; Morris, *op. cit.* 131.

Yorkshire. Its East Anglia records, however, show Glanvill as custodian of several widows and infant heirs—they are usually his relatives—and sometimes he is specifically stated to have the custody of their lands also.[30] Here again it is conceivable that Glanvill had from the King the exceptional privilege of a beneficial custody of lands in the King's wardship. In those uncertain times, however, to be allowed to hold in one's own protection the persons of one's widowed or infant relatives was probably a desirable privilege in itself, even without any claim upon the profits of their lands.

§ 4. Tenements in York

So far, we have seen no conclusive evidence that Glanvill held any lands in Yorkshire in his own right. In the city of York, however, where much of the land belonged to the demesne of the Crown,[31] we twice find him as a beneficial owner: and in each case his tenement passes eventually to a certain hospital. This hospital, founded in York soon after the Conquest and subsequently enlarged by King Stephen, was originally known as the Hospital of St. Peter; but, towards the end of the twelfth century, it was more usually called the Hospital of St. Leonard.[32]

Our only evidence of the first of these two holdings is a charter whereby "Radulphus de Glanvylla" confirms his gift, to the Hospital of St. Peter, of "all my land at Ousegate in the parish of St. Crux"; and he binds himself and his heirs to warrant the gift against all men. In the fashion of those times, the charter does not specify the area of the land and bears no date. But it states the boundaries—the King's street of Ousegate, the King's gutter, the hospital's land etc.—and was probably made during the period 1170–1176.[33]

Glanvill's other holding in the city has a longer story. First we

[30] His relatives are an infant grandson (heir of Robert fitz Ralph): 35 P.R.S. 49; the widow (his *neptis*) of Ralph de Haudebovil and the newly born heir, with lands in Suffolk, *ibid.* 60; Mabel (his *neptis*) the widow of Albric Picot and the heir (though of age and a knight) with lands in Cambs. (Quy and Waterbeach): *ibid.* 83, 84, 86. Others are the widow and infant heir of Gilbert de Colevill: *ibid.* 61. He also held for the King the dower of Countess Margaret when, for a few months, it was seized into the King's hand: *ibid.* 4–6, 62; and he acted as custodian of certain Norfolk manors of the earl of Arundell: *Red Book*, p. cclxxii (by the King's precept Glanvill gives one and a half knight's fees thereof to one Ralph de Muntkenesi in order that he may make himself a knight). According to Glanvill's Treatise, vol. vii, 12, a widow ought not to be in her lord's custody although, as his tenant, she needs his consent to remarry.

[31] Farrer, Introduction to 1 E.Y.C. p. x: with the exception of the liberty of the Archbishop, the city belonged to the Crown's demesne.

[32] 6 *Monasticon* 607 *et seq.*

[33] 1 E.Y.C. 186 (no. 225).

have, from the year 1179, a grant and confirmation[34] by King Henry to "Rannulf de Glanwilla" of "the land with houses (*sic*) which Walter fitz Daniel held of me in York for six shillings a year, which the same Walter forfeited for the murder of his wife whereof he was attainted in my court by duel at York." This grant was expressed to be to Glanvill and his heirs, to hold of the King and his heirs in fee and inheritance. Moreover, it expressly "pardoned to the same Rannulf those six shillings *per annum*." Accordingly, in the Yorkshire Pipe Rolls of the year 1180, a credit item appears against the sum due to the exchequer from "purprestures and escheats," which runs as follows: "*in terris datis* to Randulf de Glanvill six shillings of the land which belonged to Walter fitz Daniel."[35] This entry is repeated, year after year, for twelve years.[36] Then follows a three years' interval during which the Pipe Rolls say nothing of the matter. And then, in the rolls for the year 1195,[37] our six shillings reappear (as a credit against the purprestures of the city) in the following context: "*in elemosina constituta* to the hospital of St. Leonard of York six shillings of the gift of Rannulf de Glanvill." And this remained the annual formula until 1210: in that year its first three words dropped out; and, two years later, the words "of the gift of Rannulf de Glanvill" were discarded likewise.[38]

One might naturally deduce from these entries in the Pipe Rolls that Glanvill had retained until his death the forfeited land and houses which King Henry had granted to him, and that, somehow or another, perhaps by some testamentary device, they then passed to the hospital. In fact, however, four charters have survived which show that this was not so. By the first of these charters, witnessed *inter alia* by "John, son of the lord King,"[39] Glanvill granted this same "land with houses" to one William de Fyskergate and his heirs, to be held of him and his heirs in fee and inheritance at a yearly rent of thirteen pence.[40] Thereupon it seems, this William granted one of the houses, if not the whole property, to the hospital; for Glanvill now makes a second charter

[34] 1 E.Y.C. 254 (no. 335).

[35] 29 P.R.S. 62.

[36] Its last appearance is in 1191: 2 N.S. 62—*cf. ibid.*, 208 (1192).

[37] 6 N.S. 27.

[38] The full formula was still continuing in 1209 (24 N.S. 123). But in 1212, in the last of the published Pipe Rolls of King John, we read only "to the hospital of St. Leonard six shillings": 30 N.S. 28.

[39] Prince John stands first in a list of 18 witnesses, who include Glanvill's brother Gerard. Prince John witnessed also Glanvill's foundation charter to Leystone Abbey in 1182.

[40] 1 E.Y.C. 255 (no. 336). Instead of a warranty there is a *quare volo* clause, similar to that employed by royal grants. There are 18 witnesses, including Prince John and Glanvill's brother Gerard.

whereby he grants and confirms "for the health of my soul and that of Berta my wife . . . the gift which William de Fyskergate made to God there of the house (*sic*) which belonged to Walter fitz Daniel in York, which the lord king gave me and which I gave to the said William."[41] In this charter, moreover, Glanvill concedes that the hospital shall hold this house fully and quit in free pure and perpetual alms: evidently the hospital is to be free of his thirteen pence of rent. At least ten of the seventeen witnesses to this charter—a charter, be it noted, by which Glanvill is diminishing his inheritance—are members or close connections of his family. They include Osbert de Glanvill, who heads the list, Hubert Walter (not yet dean of York) and Reiner de Waxham.[42]

This second charter evidently required the King's confirmation, both for general reasons of security and because it purported to give in frankalmoign to a religious house lands which were held of the Crown. King Henry confirmed it twice, in virtually identical words.[43] Each is a charter of confirmation of "the stone house in York" to the hospital of St. Peter; each charter was made by the King at Winchester; and each recites that the house "belonged to Walter fitz Daniel, which he lost by felony in my court, which I gave to Ranulf de Glanvill for his service, which the same Ranulf gave to William de Fiscergate (*sic*), and which he William gave to the same hospital." The only notable difference between them is that one—presumably the first in time—is witnessed only by Glanvill himself; and he, as we know, was an interested party. The second confirmation, however, has five witnesses, headed by Glanvill and "Hubert dean of York"; and the date assigned to it is 1186–1187.[44]

It would therefore appear that the stone house, which Glanvill had acquired from the King in 1179, became the property of the hospital some five years before he died. Yet, as we have seen, the clerks who wrote the Pipe Rolls continued to write, even after he was dead, an entry which might lead one to suppose that he retained the property until his death. And when at last, after three years of silence, they devised an entry which implied (somewhat misleadingly) that he had given the property to the

[41] 1 E.Y.C. 256 (no. 337).

[42] Others include William de Aubervill (son-in-law), Gerard de Glanvill (brother), Theobold de Valeines (nephew of Glanvill's wife), William fitz Hervei, Ranulf de Gedding, Stephen de Glanvill, and John Glanvill.

[43] 1 E.Y.C. 256–257 (nos. 338, 339).

[44] 1 E.Y.C. 257. The date assigned to the other royal confirmation is 1179–1188; *ibid.* 256. The date assigned to Glanvill's two charters is 1179–1185; *ibid.* 255–256.

hospital, it seems that they were telling a story which in fact was already ten years old.[45]

§ 5. A Witness to Charters

Occasionally Glanvill's name appears among the witnesses to a Yorkshire charter. A very early example comes from the beginning of his first period as sheriff: the charter concerns land in York and its many witnesses include Ranulf the sheriff and Hervey de Glanvill—presumably his brother rather than his father.[46] In 1181 he witnesses royal charters made at Richmond and at Rievaulx Abbey,[47] and he is sometimes a witness to private charters affecting Yorkshire lands within the Richmond honour.[48] As a rule, however, one feels that he is an unlikely witness unless the charter has some special importance: it will usually concern some relative of his or some high personage or religious foundation. One instance of this is a charter whereby the Constable of Richmond gave his daughter in marriage together with eleven-twelfths of a knight's fee as her *maritagium*.[49] Another is the curious charter described below.

This charter[50] was a grant, *circa* 1166–1176, whereby Asceria the widow of Asketil gave a carucate of land in Welburn "*de duario meo*" to the monks of Rievaulx. This she did with the consent of her and her late husband's heir. Her charter ends as follows: "I have sworn with my own hand in the hand of the sheriffess [*in manu vicecomitisse*], to wit of Bertha the wife of sheriff Ranulf de Glanvill, that this gift shall be firmly held and faithfully observed. Moreover, I have received *escambium* for that land in my husband's lifetime." Then come the names of eighteen witnesses with Ranulf the sheriff at their head. But the

[45] If, as the original grant to Glanvill says, there were (several) "houses" on the land and if, as Glanvill's and the King's confirmations say, William de Fyskergate gave (only) one house to the hospital, it may be that the apparent delay in adjusting the Pipe Roll entries has some other explanation than mere inertia or dilatory procedure at the exchequer. The missing 6s. *per annum* in the years 1192–1194 may be connected in some way with a royal pardon, granted to the hospital in 1191, of half a mark—the outstanding balance of a debt of 40s. which they had owed to Aaron of Lincoln: 2 N.S. 22.

[46] 1 E.Y.C. 253 (no. 333): the editor dates it 1163–1166. He is again "Ranulf the sheriff" in 1166–1176: 2 E.Y.C. 118 (no. 780). His father was already full of years in 1150: see [1957] Camb.L.J. 163, n. 4.

[47] 5 E.Y.C. 78 (no. 176), 140 (no. 240).

[48] *e.g.*, 5 E.Y.C. 157 (no. 263): here he is described as "*Summa justicia*" and the other witnesses include three "who were then justices at York." In 5 E.Y.C. 252 (no. 335) he is "*dominus*." In both, Reiner is a witness and is "sheriff of Yorkshire" (see also *ante*, note 8). The editor dates them 1187 and 1184–1189 respectively. See also note 49, *infra*.

[49] 5 E.Y.C. 154 (no. 262). Here he is "Randulf de Glanvill" and is the leading witness. The approximate date is 1175.

[50] 2 E.Y.C. 118 (no. 780).

extraordinary feature here is that the last six of them are women; and, at the head of these women, stand Bertha *vicecomitissa* and Maud her daughter—apparently Maud is not yet the wife of William de Aubervill.[51]

It seems clear that the monks of Rievaulx had some grave reason for fearing that Asceria or her heir might subsequently question their title to this carucate of land, and that Glanvill and his wife came to their aid in the matter. Fortunately, two other charters have been preserved which show what the difficulty was. Some ten years before, when Asceria's husband was still alive, the lord of the fee (Bertram de Bulmer) had granted to him, with a full warranty of title, certain land in Flaxton "in *escambio pro* one carucate of land which he held of my fee in Welburn."[52] On that occasion the witnesses included the Abbot of Rievaulx and the lord's son, who was said to have *granted* that *escambium*—though that probably meant only that he, as his father's heir-apparent, had concurred in the grant. Having thus recovered the Welburn land from his tenant, the lord had thereupon granted it to the monks of Rievaulx; and the charter of that grant recites that he has already given the former tenant "*escambium* to the value at his will."[53]

[51] Of the other four women, two are described as the wife of somebody and two as the daughter of somebody. Another instance of female witnesses is a late 12th-century charter whereby three sisters sold land in Northants: there the first six of 28 named witnesses were women: *Facsimiles of Early Charters* (4 Northants Records Soc. 114), no. 42.

Although Maud was presumably the eldest of Glanvill's three daughters ([1957] Camb.L.J. 173–175), her husband, unlike the husband of the youngest daughter Helewise (*ante*, n. 30), outlived Glanvill. The first sign that her nephews—she has evidently outlived her two sisters—are claiming from her their share of Glanvill's inheritance is the beginnings of an intended action against Maud *and William her husband* in the Michaelmas Term of 1194: the nephews appoint an attorney (Plac.Abr. 3; 1 R.C.R. 24: both Norfolk); the defendants essoin themselves (1 R.C.R. 102, 124: Suffolk); and the steward of the Honour of Eye claims jurisdiction over such of the lands as are held of that honour (Plac.Abr. 5: Suffolk). But by 1196 William is dead, and his heirs are in the wardship of Hubert Walter and so are exempted from the second (?) scutage of Normandy (7 N.S. 288; 8 N.S. 30). [At the very beginning of 1194, however, an evasive defendant, who is being sued by the Glanvill heirs for having re-taken lands which Glanvill had bought from him, alleged *inter alia* that Maud (William suing with her but she representing him) has an heir who, being already a knight, ought to be one of the plaintiffs (14 P.R.S. 31–32: Suffolk).]

The husband of Glanvill's other daughter, Mabel, was Ralph de Arden. He likewise outlived Glanvill. In 1194, he was pardoned a scutage because he went on the expedition to Normandy (5 N.S. 143); and it would seem that he has remarried (1 R.C.R. 121): and, at one point in the above litigation against Maud and William, he is named with his son, perhaps erroneously, as though he were representing his son in that action (1 R.C.R. 124; yet three weeks ago the son had nominated someone else: 1 R.C.R. 24).

[52] 2 E.Y.C. 119 (no. 782). The editor dated it 1147–1163. See also footnote 56, *infra*.

[53] 2 E.Y.C. 360 (no. 1049): again the lord's son is said to have consented and is a witness. The editor dates this charter 1154–1157, and adds (at p. 361)

It thus becomes clear that the carucate which Asceria, in her widowhood, now grants with such solemnity to the monks of Rievaulx is land which her husband had held and had conveyed away ten years ago. And the fact that the monks and the Glanvills have persuaded her to make this grant shows that, for some reason, she is thought to have a legal right to upset her late husband's conveyance. This must mean either that it came to him as her *maritagium* when he married her[54] or that he had specifically declared it to be her dower. Her statement that it was "*de duario meo*" seems capable of either construction.[55] And, in either case, their heir—who, as we saw, concurred in her grant—would be concerned: whether as an heir whose inheritance is at stake or as warrantor of her dower.[56] In those times, it seems, though Glanvill's treatise is strangely obscure on the point, a husband who conveyed his lands away did not thereby defeat his widow's right to claim them as her dower if he had named them as such (*dos nominata*) at the church door at the time of their espousals: after his death his heir, who will be the warrantor of her dower, must none the less recover them for her if she so desires.[57] In the treatise which goes by Glanvill's name the author seems to feel some doubt both as to a husband's power to alienate his wife's *maritagium* and his power to alienate her *dos nominata*[58]: the rule that such alienations cannot stand against her in her widowhood did not become clear law, perhaps, until some few years after Glanvill died.[59] What was done in the case of the widow Asceria, evidently on his advice, shows how he dealt with this difficult conveyancing problem when it arose in practice.

Our evidences of Glanvill in Yorkshire—the terse Pipe Rolls and a few charters which happen to survive—do not enable us to draw many confident conclusions as to his activities there. We can say

that Welburn, in the Fossard Fee, had probably come to the lord as the *maritagium* of his wife, who was probably Emma Fossard.

54 2 P. & M. 16: "probably under twelfth-century law the estate of the donee [of *maritagium*] was deemed inalienable." Glanvill's treatise, vii, 18, is silent on the point: but he says (vii, 3) that husbands cannot give away their wives' *inheritance* without the consent of their heirs.

55 Martin, *Record Interpreter*, translates *duaria* as "jointure; dowry." The British Academy's *Medieval Latin Word-List* translates *duarium* as "dowry, marriage-portion."

56 The concurrence of the heir-apparent or heir-presumptive was usual in 12th-century gifts of land: at that time freedom of alienation was not fully developed, though the precise rules are not entirely clear. See 2 P. & M. 13, 306–311.

57 Glanv., Bk. 6, cc. 3, 11, 13. See also Woodbine's note to *Glanvill*, pp. 217–218; and 2 P. & M. 421–422.

58 See notes 54, 57, *supra*.

59 See 9 Camb.L.J., 91 (n. 24), 198 (n. 48) for early cases of actions to recover *maritagium* between 1194 and 1202; also Woodbine's *Glanvill*, p. 218, for a widow recovering her dower from her husband's alienee in 1194.

that he visited the county, even in the busy years of his justiciarship when Reiner was fulfilling his local duties for him. During his first period as sheriff we have seen him at York accompanied by his brother (or father) Hervey, and at Rievaulx Abbey with his wife and his daughter Maud. The two charters affecting the stone house at York, which were witnessed by Prince John and by many Glanvill relatives, were made during his second period as sheriff, when Reiner was his deputy, and seem likely to have been made in Suffolk rather than in Yorkshire.[60] It may be, indeed, that he seldom visited the county during that period except in his capacity of judge or justiciar. Nevertheless, it is curious that we find no hint that he owned any estate or residence in the county wherein he had so many official duties: we read only of the " stone house " in York, and this he disposed of soon after the King had given it to him. Nor is there any sign that he had ever occupied the Yorkshire estates which, as we have seen, he settled upon his sister, on her marriage to William de Stutevill[61]: it seems likely that he acquired them simply for her benefit.

How, then, are we to suppose that he housed and sustained himself, and any retainers and members of his family accompanying him, on his official visits to this county? It may well be that the widespread Honour of Richmond was required to accommodate him and his household when necessary[62] and that on occasions he and his company would lodge with his sister or with his son-in-law at Middleham in the North Riding.[63] But there is another possibility. Glanvill, as sheriff, enjoyed the sheriff's customary perquisite of hospitality, a perquisite—in theory voluntary—which bore hardly on religious houses and others when exercised to excess in the following century.[64] We have seen, in the charter of the widow Asceria, an indication that he with his wife and daughter enjoyed the hospitality of Rievaulx Abbey in his early days as sheriff. And it is not unlikely that he enjoyed similar amenities elsewhere, as at the hospital of St. Peter or St. Leonard in York.

[60] The witnesses correspond rather closely to those who attested Glanvill's foundation charter for Leystone Abbey in Suffolk *circa* 1182: 6 *Monasticon*, 880.

[61] [1957] Camb.L.J. 164, n. 8.

[62] A custodian of royal estates accounted annually at the exchequer for " a sum assumed to cover everything he received except provisions ": W. A. Morris, *Medieval Sheriff*, 130.

[63] That son-in-law was Robert fitz Ralph fitz Ribald [1957] Camb.L.J. 175.

[64] See Morris, *op.cit.*, 282 for the excessive demands made by the sheriff of Cambridge upon the priory of Barnwell, where he would stay for several days at a time with his wife and family and numerous horses and retainers.

APPENDIX

FIVE HIDES IN ABINGTON (Cambs.) OF THE HONOUR OF RICHMOND (*cf.* p. 180, n. 16, *ante*).

§ 1. Introduction

There are some problems about the early history of Little Abington (Cambs.) which are not easily solved. One difficulty is that the county of Cambridge, then as now, had three Abingtons—for there are also Great Abington and Abington Piggotts—and, until most of the thirteenth century was over, the contemporary records named each of them indifferently "Abiton" or the like.[65] Another difficulty is that both Great and Little Abington are situate in the same—the Chilford—Hundred, and indeed are adjoining villages,[66] each with its own church: accordingly, even those early records (such as the Domesday Survey) which lists vills and villages under their hundreds do not enable us readily to distinguish these two from one another.

In Domesday, the Abington references for the Chilford Hundred, as it stood in the year 1086, are briefly as follows. Half a virgate (*i.e.*, some 15 acres) "in Abintone" is *terra regis*, now held for the King by Picot who has ousted the usurpation of Aubrey de Ver (ff. 190, 199*b*); Count Alan of Brittany, moreover, "holds Abitone," five hides of land of which two and a half hides are in demesne (f. 194); and Aubrey de Ver "holds Abitone"—it is farmed out from him as six hides of land and Count Alan is now claiming one of these from Aubrey's men (f. 199*b*).[67] Nearly two centuries afterwards, however, in the Hundred Rolls, the Abington references for the Chilford Hundred will distinguish between "Abyton Parva" and "Abyton Magna"; and will say that the many tenants of the former hold (directly or indirectly) of the Count of Brittany, who holds of the king in chief, and that Robert de Ver, the earl of Oxford, holds Abyton Magna of the king by barony and has the advowson of its church.[68] It would thus appear

[65] See Darby, *Domesday Geography of Eastern England*, 10–11, 267–269; Farrer, *Feudal Cambridgeshire*, 6–7, 54–57.

[66] Apparently the river Granta is their dividing line. Abington Piggotts, however, is in Armingford Hundred and some fourteen miles away—its name evidently derives from Picot (the Domesday sheriff) who held land there.

[67] See also *Inquisitio Comitatus Cantabrigiensis* (ed. Hamilton), 31, 32, 35, to the same effect. For the 15 acres of *terra regis*, see footnote 100, *post*.

[68] *Rotuli Hundredorum*, ii, 422*b*, 423*a et seq.* (1279). The advowson of Little Abington church belonged at that time not to the Honour of Brittany nor to its immediate tenant (the heir of John de Burgo) but to one of the latter's tenants John de Vallibus, who was himself a mesne lord. As to the earl of Oxford holding Great Abington, see further, *e.g.*, *Book of Fees* (1242), 921—"Abiton"; *Calendar of Feudal Aids* (1284–1286), i. 140 "Abitone Magna."

that the five hides which Domesday attributed in the eleventh century to the honour of Brittany (*i.e.*, the honour of Richmond in Yorkshire) was known in the late thirteenth century as "Little" Abington, and the earl of Oxford's holding as "Great" Abington. And in the meantime, if a hint from the middle of the twelfth century can be trusted, they had probably been called in common speech the Abington of earl Conan (Count Alan's successor) and the Abington of earl Aubrey respectively.[69]

The surviving legal records of the late twelfth and early thirteenth centuries show that Little Abington was exposed at that time to a period of fiercely contested litigation. We shall see that in the course of that litigation men spoke of hide, vill, and knight's fee: words which are not nowadays easy to define. The ancient *hide*, it seems, was a unit of taxation, a tract of arable land (ignoring its attendant pasture, etc.) whose area might vary somewhat from place to place: in Cambridgeshire, if not elsewhere, it was ordinarily 120 acres or thereabouts.[70] The *vill*, as a geographical unit, was ordinarily five (or ten) hides.[71] The *knight's fee*, which eventually replaced the hide as the unit of land taxation, seems to have begun (patterned on Domesday) as ordinarily five hides likewise, but seems afterwards to have become very variable both in hidage and in area.[72]

The two chief contestants in this litigation, Simon le Bret and John de Lanvalei, seem to be contending with each other for the whole of Little Abington: they contend, they say, for five hides: and this, as we have seen, was Little Abington's assessment in Domesday. Now and again, however—and on one occasion in an action which expressly claimed five hides—one or other of them says, without contradiction, that he is claiming a *half* of the vill, or that he claims a *half* of the "whole" vill. This apparent incongruity persists, in a different form, in the later actions of the series, wherein there is talk of vill and knight's fee but not of hides. Thus,

[69] At the end of the Cambridgeshire entries in the Pipe Roll for 1157–1158 (P.R.S. 166), under the head "New Pleas and Agreements," is a list which includes as successive entries "20s. de Abiton Com. Conani . . . 2 marks arg. de Abiton Com' Alberici. . . ." In so far as the entries in this list assert their origin they are fines *pro murdro* imposed on certain localities: the named localities include two hundreds and the vills of Gamlingay and Fowlmere. Evidently our two Abingtons are each being fined as though separate vills: and it is not, as one might at first sight suppose, two isolated scutage assessments upon their respective proprietors.

[70] Maitland, *Domesday Book and Beyond*, *e.g.*, at pp. 336, 389, 394: the virgate, a quarter hide, was usually 30 acres: *ibid.*, and at pp. 385, 519. See also Darby, *op.cit.*, 274 *et seq.*; 1 P. & M. 346–348.

[71] Maitland, *op. cit.*, pp. 10 *et seq.*; Darby, *op. cit.*, 277–279.

[72] Maitland, *Constitutional History*, 157–158; 1 P. & M. 235–236. This variability was most pronounced, it seems, where there had been sub-infeudation: see Sayles, *Medieval Foundations of England*, 226.

when Simon ultimately wearied of the conflict and released (to John's nominee) "one half of the whole vill," the fine by which he did so indicates that what he conveys is held "by the service of [only] half a knight's fee." What he had claimed in the past as five hides was thus, in terms of knight's service, only one half of what one would expect. This continuing problem throughout our series of cases can hardly be explained away as an error by the parties or by those who wrote our records of their litigation.[73] One is driven, therefore, to suppose that Simon and John, when each in turn laid claim to the land, were really claiming perhaps an equal co-ownership and possession of the whole of it. This theory is supported, in some degree, by an early record of uncertain date which, listing those knights of the honour of Brittany who owe guard-duty at Richmond Castle, contains the words "In Cambridgeshire . . . in Abinton, Simon le Bret and John de Lanvalein [*sic*] one knight."[74]

How this co-ownership (if such it was) had begun is hard to say. In those days the common form of co-ownership was co-parcenary among co-heiresses or among the respective heirs of their bodies: it seems that they commonly partitioned the inheritance and that their co-parcenary became several ownership when the younger daughter's portion had descended thrice.[75] Nevertheless, there is no clear hint in our cases that John and Simon were in any way related. There is indeed a possible hint to the contrary: for John, when suing by writ of right, based his claim upon a grandfather's seisin (*temp.* Hen. II) which was not denied.[76] Moreover, it does not seem unlikely that a vill which in Domesday was divided, half of its five hides being then in demesne, might remain divided when (in subsequent centuries) there is demesne no longer.[77]

§ 2. Litigation in A.D. 1195–1205

For a period of ten years or more, in the reigns of Richard and John, Simon le Bret with Simon his son contended with John and William de Lanvalei (and with William his son) for the Little Abington land and for the right to present clergy to its church.

1194–1195: *Simon sues John for land.* The beginnings of this

[73] Nor, I think, by supposing that they thought of Great and Little Abington as a single vill; for the two were evidently regarded as separate vills some forty years earlier: see footnote 69, *ante*.

[74] Cal. Inq. Misc. i., no. 521. *Cf.* footnote 97, *post*.

[75] See Glanvill, *De Legibus Angliae*, vii. 3: thereupon the lord must take her heir's homage, but not before.

[76] But the grandfather was not a Lanvalei: he was Alan fitz Henry (or Hemeri): 1 C.R.R. 72; s.c. Plac.Abr. 61.

[77] *Cf.* 5 E.Y.C. 239, surmising that Simon's "interest in Little Abington" came from this demesne. *Cf.* also nn. 97, 99, *post*.

litigation are described in the latest volume of the Pipe Roll Society's publications.[78] Four knights bring to the King's Court, early in the year 1196, the record of the court of the countess (Constance) of Brittany and Richmond, and they relate what happened there when Simon Breton (or le Bret) brought the king's writ of right against John de Lanvalei and Hamo fitz Alan and William his brother, claiming from them five hides[79] of land in Abblinton (*sic*). We observe that the disputed land was held of the honour of Brittany and so was situated in Little Abington, not in Great Abington as some have formerly supposed.[80]

The four knights, like Simon le Bret himself, had strong Lincolnshire connections; and this, coupled with the marginal venue, "*Linc*," in the Curia Regis roll, suggests that the court of the countess for which they spoke was situate in that county.[81] The knights tell of the customary essoins and delays, of fruitless attempts to distrain the defendants to come to court, of a writ from the lord of Canterbury (Hubert Walter) ordering respite whilst John is with William de Lanvalei on the king's service, of another writ that the plea proceed, and of John's failure to appear at the reasonable day then set for him: thereupon, they say, the court took the land of Hamo and of William into the hand of the countess (for nine successive periods of fifteen days, it seems) and, since they neither came nor replevied it, awarded that land to the plaintiff: and then, John having improperly tried to essoin himself *de malo veniendi* thrice, once for his journey by sea and twice for his journey by land, they took into her hand his part of the land likewise. Thereupon, they conclude, John came at last to her court and sought to replevy not only his own part but also the lands which Hamo and William had held—presumably as his tenants. The record of John's prayer for replevin, be it noted, is that he prayed in all "one-half of the whole vill of Abblinton." And yet, as we have seen, the land comprised in the action was stated at the outset to be five hides, which was the Domesday assessment of the vill entire. What, if anything, the King's Court

[78] 31 N.S. 87–88; s.c. 24 P.R.S. 239–240.

[79] The introductory recital speaks of 5 *virgates*; but the knights speak of 5 hides. The virgate was approximately 30 acres, the hide approximately 120 acres, of arable land: *ante*, footnote 70.

[80] *e.g.*, the indexes to 1 C.R.R. 72 and 3 C.R.R. 174, 218.

[81] Of the four knights, I have noticed Robert de Curson in Norfolk and Suffolk as well as in Lincs (where he held of the honour a third of a knight's fee); Benedict de Wyberton and Lambert fitz Tuli (or de Bussay) in Lincs only—a Master Benedict held there a half fee of the honour; and a Richard de Lea only in Essex and Beds—but the honour of Richmond had fees in Lea (or Lee) in Lincolnshire: see *e.g.*, vols 1–4 of C.R.R.; and *Books of Fees*. Simon le Bret held a knight's fee of the honour in Lincs (*ibid.* 194; *Red Book*, 520–Simon le Broc, *sic*) and another in Yorkshire it seems (5 E.Y.C. 239).

decided in this matter we do not know; for the roll seems to state only what the knights reported and how (on behalf of the court of their countess) they answered John's objections. The next action between them seems to imply that in this one Simon prevailed.

1199: *John sues Simon for land.* At the beginning of the year 1199, John is again in the King's Court, this time as plaintiff. He is suing Simon le Bret, by writ of right at Westminster, for five hides of land with their appurtennaces at Abliton [*sic*] and he alleges that his grandfather was seised thereof in the time of King Henry the father.[82] But again John fails, this time for the reason that he is not his grandfather's nearest heir. He has to admit that he has a "nephew" (Simon says indeed that there are two), a Hamo fitz Alan who was born of John's father's elder brother: and although, as John says, this "nephew" has granted to John (in the court of the earl of Brittany) [83] all the right which he formerly had in the land, that does not enable John to sue, as though he himself is now the heir—by writ of right.[84]

1199: *John sues Simon for cattle.* A few months pass and then, in the summer of 1199 (shortly after King John's accession), our John provided yet another problem for the King's Justices. He is claiming from Simon eighty marks *de catall'* and has come, with his "law" which he has waged against Simon, asserting that Simon unjustly and without a judgment of the court of the earl of Brittany disseised him of them. It would seem that Simon, erroneously supposing that John's failure on a technicality in the previous action meant in law that John has no title to the Abington land, had seized and appropriated John's beasts there, and that Simon his son and a William le Megre had assisted him in this adventure. It would seem also that the early stages of this law-suit occurred, in the court of the honour, in Lincolnshire; for the record of it in the rolls of the King's Court has a double marginal venue—*Linc. Cantebr'*.[85] That record begins, moreover,

[82] 1 C.R.R. 72 (marginal venue Cantebr') indexed s.t. Great Abington; s.c. Plac.Abr. 61 (there dated 10 John, but in fact 10 Richard). The plea is recorded as though it was both heard and decided in the Hilary Term, so perhaps Simon's essoin against John, in May 1199, "concerning a plea of land" (1 *Rotuli Curiae Regis*, 269) relates to some later action.

[83] If John said "earl" (rather than "countess") advisedly, he thereby implied that the land was granted to him prior to Geoffrey's death some fifteen years before: *cf.* p. 192, *ante*. The countess Constance did not die until 1201: 4 E.Y.C. 113.

[84] Perhaps, moreover, John misdescribed the land at the preliminary view: 68 Selden Soc. 79. It seems likely that, when this action was over, Simon le Bret began at once a fictitious action against Simon his son, with intent to levy a fine and so strengthen his title: see 1 C.R.R. 73 (Hil. 1199, Cantebr')—the court gave them a day for next Easter with licence to concord. But at Easter the father essoined himself and then Geoffrey fitz Peter's writ put the plea in respite: 1 R.C.R. 240, 310.

[85] *Ibid.*, 451.

with the grave and unusual word *Loquendum*, which suggests perhaps that the new king or his justiciar was to be consulted about it; and then it proceeds to tell how Simon—who had already essoined himself three weeks earlier [86]—sought a postponement on grounds of impending service with the king, and how John objected that Simon did not come and say so before the third day. Then comes an obscure passage which seems to say that the three defendants, when John had stretched forth his right hand over the book, dragged him back, saying that he wickedly intended, with his hand upon the book, to swear away the cattle.[87] Finally, the King's Court gave its decision: John has proved his claim about the cattle; and Simon's two co-defendants, Simon junior and William le Megre, are in mercy.

1200–1201: *Their oblations to the King.* The Pipe Roll for the year ending Michaelmas 1200 states (among the "*nova oblata*") that John de Lanvalei owes twenty marks and one palfrey "for having the debt which Simon Brito owed him as had been adjudged in *Curia Regis*." This was surely a high price to pay to the King for "having" (*i.e.*, for the privilege of levying execution in respect of) a judgment-debt of eighty marks; and there is no sign that any of that price was ever paid.[88] Then, in the following year, his adversary Simon likewise offers and owes an oblation. His offer is ten marks "for having an inquest as to how much the *catalla* are worth which John de Lanvalei has taken from him and for having right concerning them": and we are left wondering whether this is some fresh cattle squabble between John and Simon, distinct from the *loquendum* action and based upon converse facts, or whether (as seems more likely) Simon is merely complaining that John has been trying to exact from him more than the eighty marks which he owes. However this may be, Simon's offer to the King is the beginning of a long and sorry story. It begins in the Oblate Rolls of the year 1201 (where the King's order to his justiciar to cause right to be done according to the custom of England requires him first to do what he can to ensure that the promised ten marks will be duly paid); thence it passes to the Pipe Rolls in 1202, where it stays, with nothing of it paid, for several years; then it is

[86] *Ibid.* 240 (marginal venue Cantebrig).

[87] The shorthand of the rolls seems, when extended, to say: *Ipse Simo et filius suus et Willielmus le Megre arripuerunt ipsum Johannem per manum dextram extensam ultra librum, dicentes quod nequiter voluit abjurare super eum pecuniam illam.*

[88] 12 N.S. 47; repeated the following year—14 N.S. 68. In each the entry is under Essex and Herts., where William de Lanvalei held a knight's fee of the de Veres (*Red Book*, 353). The entry unaccountably ceased after that year. Unlike Simon, John seldom appeared in the Pipe Rolls: they name him only in the years 1200–1202 and only in relation to these two cattle oblations.

combined with Simon's other outstanding debts owed to the King (another £17 or so); and eventually the exchequer orders that the residue of this composite debt be discharged by annual instalments of fifteen shillings.[89] It may be, of course, that Simon had faintly hoped that his oblation might somehow lead incidentally to a reversal of the *loquendum* decision of 1199 or to reduce (*e.g.*, by way of set-off) the eighty marks at which the cattle in that action had been valued against him. Our next record shows, however, that any such hope died quickly.

1201: *Their final concord.* The surprising result of John de Lanvalei's success in his cattle-action is that it secured for his family what he had failed to get in his previous action by writ of right. It seems that Simon le Bret was unable to pay the 80 marks of damages which he now owed to John. It seems, moreover, that John wanted the Abington land not for himself but for William de Lanvalei—who was doubtless the William with whom John had served King Richard beyond the seas and who was probably John's uncle or brother. Accordingly, in the following term at Westminster, a final concord was made between John (that William acting on his behalf) and Simon le Bret.[90] It describes itself as a final concord concerning a debt of 80 marks, whereby (i) John for himself and his heirs has quitclaimed the debt (or some portion of it) to Simon and his heirs for ever,[91] and (ii) Simon, at the petition and with the consent of John, has granted or released (with warranty) to the said William de Lanvalei and his heirs "one half of the whole vill of Abinton," which the said Simon had in the same vill, with all its appurtenances, to be held by the service of one-half of a knight's fee.[91] As we shall see, the King's Court were to hear more about this final concord, in four years' time, from the mouths of William's son and Simon le Bret—the latter speaking as the warrantor of the abbot of Waltham.

[89] *Rotuli de Oblatis et Finibus*, 177; 15 N.S. 238; 19 N.S. 204; 30 N.S. (1212) 105, etc. In these the county is Lincs., where Simon's lands chiefly lay. His oblation was also seeking the removal to Westminster of an assise of novel disseisin which was then pending in Lincolnshire between him (or Simon his son) and his nephew Alexander de Pointon: *cf.* 4 E.Y.C. 240, n. The very first thing that the King's resulting order to his justiciar had required of him (*Rot. de Obl.* 177) was *quod finem illum si poterit ascerscat.* Conceivably, perhaps, the word *finem* may mean here not the oblation itself but the 80 marks at which the cattle had been assessed in the *loquendum* action.

[90] Hunter, *Fines of Divers Counties*, 1, 288 (s.t. Cambs).

[91] There are deficiencies in the roll which leave room for (i) a statement that William de Lanvalei has discharged 50 marks of the debt (as was specifically alleged in 3 C.R.R. 262—see footnote 96, *infra*)—there is indeed a hint in it that John released to Simon only 30 marks of the debt; and (ii) for the hidage of the land; and (iii) for something as to whether William was to hold of Simon or of the chief lord of the fee direct—presumably the latter.

1204: *John acquires an interest from William's son.* The Michaelmas term of the year 1204 brings us to the final stages of the Abington litigation. There are two actions, in each of which William, the son of William de Lanvalei, is concerned, and this although he is said still to be an infant.[92] Evidently his father is now dead; and we will assume, though unable to give strict proof of it, that William the younger is in some sense a "nephew" of John de Lanvalei. The first matter for the King's Court is a concord, between young William and John his uncle, which hints that the elderly John has now taken a wife and so repents of his former generosity to William's father. In that concord, young William grants "half of the vill of Abinton" to John for life and thereafter to his heirs (if he shall have any) begotten of Christiana his wife, to be held of William and his heirs by "the service of half a knight." But the concord expressly reserved to William and his heirs "the half of the church which pertains to that half"; and it provided that, on John's death without leaving heirs by Christiana, his other heirs should have from William and his heirs four marks from the land for ever.[93]

1204–1205: *Half the advowson of the church.* Then, only a few days later, we find this William ("who is within age") bringing against the abbot of Waltham an assise of last presentation to half the church of Abinton.[94] The abbot says that he was given it by Simon le Bret, and vouches Simon to warrant the gift. Simon comes and warrants and says that he made the gift in King Richard's time—evidently seeking to imply that he had made the gift before making the final concord in which he had granted the half-vill with its appurtenances to William's father. Nevertheless, at an adjourned hearing in the following year, William prevails against him.[95]

William had supported his action for the right of presentation, first, by alleging that the fine whereby Simon had granted the half-vill to his (William's) father was prior in time to Simon's gift to the abbot; secondly, by two attempted explanations (one at each hearing) of the curious fact that the consideration given in a fine, based upon a debt due to John de Lanvalei, was a grant of land

[92] 3 C.R.R. 218.

[93] 3 C.R.R. 174, Cantebr' (both vill and church are here indexed wrongly s.t. Great Abington): s.c. Plac.Abr. 72. This Christiana is the sister of a Robert de Meleton.

[94] 3 C.R.R. 218, Cantebr'; s.c. Plac.Abr. 73.

[95] 3 C.R.R. 262 (Hil. 1205, Cantebr'); s.c. Plac.Abr. 46. Meanwhile Richard the abbot has appointed one of his canons to act as his attorney in the action "to gain or lose"; 3 C.R.R. 237, Kantebr'.

to William de Lanvalei; [96] thirdly, by insisting that (as we already know) the fine had granted the land to his father William " with all its appurtenances "; and lastly, by alleging that his father William was afterwards seised of that half-vill (and so of its appurtenance the half-church) before the date of Simon's attempted gift of the half-church to the abbot. On this latter point, William put himself upon a lawful jury of the country. And then, when Simon raised the evasive objection that no chirograph of the fine was ever made, William replied that that was Simon's fault, in that he had departed from the court before the chirograph could be delivered. Moreover, having no chirograph to show, William had also to " put himself upon the record of the court "; and the justices ultimately testified that the fine had been duly made. Their testimony, and the fact that Simon and the abbot declined to take the verdict of a jury, gave William his victory.

§ 3. Conclusion

In the course of this last action, Simon is reported ambiguously as having " said that he never made concord with William de Lanvalei, but formerly he had his half of the vill in pledge." If there was any such pledge we can hardly doubt that Simon was the pledgor, for there are records of his borrowings elsewhere: but, whatever he meant, it is clear that—as in his former concord which he now denies—he is saying that what he had was a half only and not the whole. Thus everything he says seems to support the undated record as to castle-guard at Richmond, (*ante*, p. 191), which stated that he and John de Lanvalei together held of the honour the Little Abington fee: Simon has said nothing to suggest that he held it alone.

Soon after our Abington litigation had ended, both Simon le Bret the elder and John de Lanvalei disappear from the records. They are evidently dead, and John's Christiana, it would seem, bore him no heir. Moreover, we must suppose that William de Lanvalei the younger, who had evidently inherited from his father the half that had originally belonged to Simon, inherited likewise the half that belonged to John: for the records of the year 1212 reveal this William de Lanvalei as now holding, of the honour of Brittany, the complete knight's fee of Abintone (Cambs.).[97]

[96] At the first hearing, William alleged that John had attorned the (full) 80 marks to his (William's) father. At the adjourned hearing he said that Simon le Bret made the fine in return for 50 marks which William's father had given him. Neither explanation fits perfectly, I think, with what remains of the actual record of the fine: see *ante*, p. 195 and footnote 91.

[97] *Red Book*, 528. If the " one knight " of the castle-guard record (*ante*, n. 74) implied only guard duty and not, as we have supposed, a tenurial knight's

His daughter and heir, named Hawisia after her grandmother, married a John de Burgo, and brought to him lands which included the barony of Buckland in Berkshire.[98] They included also, as one can see from the Hundred Rolls,[99] the knight's fee in "Little Abiton" which her father had held of the honour of Richmond or Brittany. But by that time (1279–1281) there have been numerous sub-infeudations; and the more important of the sub-tenants in demesne, who now hold the land comprised in the Little Abington fee, are Sir Robert de Tudenham, John de Girund and the prioress of St. Radegund.[100]

fee shared between John and Simon, there may be an arguable possibility that what we have called John's half was in fact demesne land of the Honour until *circa* 1200 A.D. and was then granted to William (or to his father) *de novo*: *cf.* note 77, *ante*.

98 *Rotuli de Oblatis et Finibus*, 372; *Book of Fees*, 667, 866 (and Index, p. 112). By 1219, she has inherited both her father's and her grandmother's lands and is an infant in the custody of the justiciar Hubert de Burgh (26 N.S. 203; *Bracton's Note Book*, no. 43); by 1232, she is the wife of John de Burgh (*ibid.*, nos. 681, 682).

99 Vol. ii. 423*a*, 424*a*. For all except 30 acres or so (as to which see footnote 100, *infra*), the "heir of the lord John de Burgo" is the highest mesne lord, holding directly of the honour of Brittany. The mesne lord next beneath him is, as to the Tudenham holding, John de Vallibus (who has the advowson—*ante*, footnote 68), and, as to the Girund holding, Hugh de Wyndesor. In *Feudal Aids*, i. 140 (1284–86), the two holdings are together assessed at one knight's fee.

100 Apart from some acres of escheats, the Prioress (*ibid.* 424*b*) held 30 acres, with its meadow and pasture, in *elemosina*, of the heir of Helewys de Wytsond; and the mesne lord intermediate between that heir and the honour was "the heir of Simon le Bret" (the younger, *semble*): *cf.* preceding footnote. Perhaps this incongruous 30 acres (1 virgate) derived somehow from the half-virgate which had been *terra regis* in Domesday: *ante*, p. 190. But the Pipe Rolls, printed for the period 1155–1212 and for 1230, leave this doubtful:—in 1166 the sheriff accounts for 4s. for corn sold in Abinton and for 3s. 3d. for half a virgate of land there (perhaps already let to a tenant) 9 P.R.S. 85; the latter part of this entry recurs annually (now as for 15 acres) for ten years, whereafter the tenant holding those 15 acres is named as Simon *clericus* (25 P.R.S. 71); after a further ten years Simon's rent is raised to 4s. (37 P.R.S. 78) and so remains: but in 1230 we find that this 4s., "for the 15 acres of land which Simon *clericus* held," is now being collected from the countess of Oxford (4 N.S. 56). *Cf.* 67 *Selden Soc.*, no. 3519—a *pone* for half a virgate in 1199.

TURPITUDE AND TITLE IN ENGLAND AND INDIA

R. N. Gooderson

The original object of this paper was to consider the main differences between the law in England and India as to the recovery of money paid, goods delivered or land conveyed under an illegal agreement, first by restitution where the property has already passed, secondly by retention of a prior rightful title, limited or general. It has, however, been found necessary to devote a good deal of attention to the English law. On investigation, the paths do not all prove to be as well trodden as might have been expected. Grodecki, Hamson and Howard Street, among others, have made valuable contributions in this field,[1] but little attention has been paid to the interplay of the various maxims that have influenced the development of the law, and there seems never to have been any attempt to make a comprehensive statement of the various rules of English law applicable where one of the parties to an illegal agreement seeks to rely on his title. The absence of any such analysis has led to doubt and difference of opinion in India, which can be resolved if the English cases are placed in what is believed to be their true setting.

In this branch of the law, the courts have generally speaking been predisposed towards the defendant. The well-known maxims show this proclivity: (i) *ex turpi causa non oritur actio*, (ii) *nemo turpitudinem suam allegans audiendus est*, (iii) *in pari delicto potior est conditio defendentis*, (iv) let the estate lie where it falls. These maxims have been adopted in India, where the only statutory provision in the Contract Act, 1872, s. 23, does not deal with the effects of illegality, but merely declares agreements void where the consideration is forbidden by law . . . or the court regards it as immoral or opposed to public policy. Two other statutes do deal with the effects of illegality: section 6 (*h*), Transfer of Property Act, 1882, enacts that no transfer can be made for an object or consideration unlawful within section 23 of the Contract Act, and section 84, Trusts Act, 1882, gives statutory recognition to two English exceptions to the third maxim, first where the *delictum* is

[1] Grodecki (1955) 71 L.Q.R. 254; Hamson (1949) 10 Camb.L.J. 249; Street, *Law of Gaming* (1937) Part III, Chap. VI.

not *par*, and secondly where the illegal purpose is not carried into execution.[2]

The third maxim concerning parity of *delictum*, which *ex facie* is most hostile to a plaintiff, did not make its English début until 1760,[3] and during that century the advantage of allowing restitution to the plaintiff in some circumstances was canvassed. This doubt was felt only in cases where the plaintiff had paid over money or delivered goods to the defendant: if the plaintiff sought to derive some positive benefit from an illegal agreement, as in *Collins* v. *Blantern* (1767),[4] his claim was inevitably denied. That was a suit on a bond. The defendant proved that the consideration was the plaintiff's refraining from prosecuting for felony, and the suit was dismissed. There can be no two opinions as to public policy in such a case: the law must show its displeasure by refusing any remedy. Where the plaintiff had parted with some property, the better way of furthering public policy was not so obvious. During the eighteenth century, there was a conflict of opinion, nowhere more graphically illustrated than in the judgments of Lord Kenyon C.J., who between 1789 and 1800 in ten decisions gave an equal number of opinions on either side. In the first two cases, he rejected claims to recover money paid under stock-jobbing transactions.[5] Street's research has yielded two cases in 1791 and 1792 where recovery of premiums was decreed in cases of illegal lottery insurance,[6] and the latter year yields a dictum favouring restitution in a case of *malum prohibitum*.[7] In 1794, sandwiched between two decisions for the defendant, the one in a case of illegal lottery insurance the other of stock-jobbing,[8] is a judgment bidding a reluctant farewell to the principle of restitution.[9] In 1798, however, restitution is again ordered,[10] but in 1800 a claim to recover a premium on an illegal insurance is denied, with the comment that the maxim about *par delictum* has been " settled at

[2] " Where the owner of property transfers it to another for an illegal purpose, and such purpose is not carried into execution or the transferor is not as guilty as the transferee, or the effect of permitting the transferee to retain the property might be to defeat the provisions of any law, the transferee must hold the property for the benefit of the transferor."

[3] *Per* Lord Mansfield in *Smith* v. *Bromley*, 2 Doug. 696, cited by Grodecki, at p. 256.

[4] 2 Wilson K.B. 341. In some quarters this decision has been regarded as of very wide import: *infra*, nn. 98, 1.

[5] *Andree* v. *Fletcher* (1789) 3 T.R. 266; *Petrie* v. *Hannay*, 3 T.R. 418 (diss.). In the welter of apparently conflicting opinions proceeding from him, his Lordship at least held firm to the view that in stock-jobbing cases no restitution should be made.

[6] Street 469 (n), citing *Cobdale* v. *Kendrick* and *Alfred* v. *Loricus*.

[7] *Munt* v. *Stokes*, 4 T.R. 561, 564.

[8] *Drummond* v. *Deey*, 1 Esp. 153 (there is no reference to the contrary view in the 1792 cases, cited n. 6, but perhaps in those the transferor was less guilty); *Steers* v. *Lashley*, 6 T.R. 61.

[9] *Pickard* v. *Bonner*, Peake 289, 290.

[10] *Lacaussade* v. *White*, 7 T.R. 535.

all times."[11] Thereafter it was definitely settled in the courts of common law, and virtually even in the chancery, that the defendant would succeed, unless the plaintiff could bring his case within some definitely established exception to the general rule forbidding restitution, and that a vague appeal to public policy would be in vain.

In the last decade of the seventeenth century, no consistent practice in the Chancery courts is traceable.[12] In two cases in 1686 and 1687, Jeffreys L.C. ordered bonds to be delivered up to be cancelled, one for a marriage brokage consideration, and one in fraud of a marriage agreement,[13] but in 1687 Trevor M.R. refused such relief on the ground that the contract was executed and no longer executory.[14] This case has a modern ring as the first drawing this distinction, one which is now firmly established.[15] In 1690 is a case where the bond is cancelled, though only on the ground that it is not the culpable executant who seeks relief, but his personal representative.[16] In the same year is a case where not only is a policy of insurance cancelled, but the premium ordered to be repaid.[17] In the eighteenth century, there are frequent instances of bonds being cancelled, or proceedings upon them restrained by injunction,[18] but cases where there is a further order for the repayment of money are few.[19] The idea that a plaintiff

[11] *Vandyck* v. *Hewitt*, 1 East 96, 98, cited Grodecki, 258. This record perhaps supports Thayer's appraisal of his Lordship as that "famously ignorant man": (1881) 15 Am.Law Rev. 10, n. 1.

[12] For contemporary common law vacillations, see Grodecki, 256–257.

[13] *Drury* v. *Hooke*, 2 Chanc.Cases 176, 1 Vern. 412; *Gay* v. *Wendow*, 2 Freem. 101.

[14] *Whaley* v. *Norton*, 1 Vern. 483.

[15] *Taylor* v. *Bowers* (1876) 1 Q.B.D. 291.

[16] *Matthew* v. *Hanbury*, 2 Vern. 187.

[17] *Wittingham* v. *Thornborough*, Prec., Ch. 20.

[18] *Shirley* v. *Martin* (1779), referred to in *Roche* v. *O'Brien* (1810) 1 Ball and B. 330, 358 (Ir.), (Court of Exchequer, exercising equitable jurisdiction, restrain proceedings on marriage brokage bond); *Hanington* v. *Du Chatel* (1781) 1 Bro.C.C. 125 (place brokage bond—proceedings restrained); *Neville* v. *Wilkinson* (1782) *ibid.*, p. 543 (restraint of proceedings to recover large debt which, in fraud of a marriage agreement, had been represented as only £11); *Scott* v. *S.* (1787) 1 Cox 366 (bond cancelled by Exchequer Court, where, for similar fraud, represented as not indebted); *Easterbrook* v. *Scott* (1797) 3 Ves.Jun. 456 (bond cancelled where creditor, in fraud of other creditors, represented his debt below actual amount).

[19] *Goldsmith* v. *Bruning* (1700) 1 Eq.Ca.Abr. 90, pl. 4 (marriage broker ordered to repay 50 guineas); *Keat* v. *Allen* (1707) 2 Vern. 588 (marriage brokage bond—interest ordered to be repaid); *Law* v. *Law* (1735) Cas.t.Talbot 140 (order for delivery of bond given to place broker—there was also a claim for repayment of £10, but this is not mentioned in the judgment, or in 3 P.Wms. 191 even in the report); *Morris* v. *McCullock* (1763) Amb. 432 (recovery of £200 paid to procure service commission); *Whittingham* v. *Burgoyne* (1797) 3 Anst. 900 (Exchequer Court orders return of money levied by sheriff, in execution proceedings on a bill of exchange, the consideration for which was an unlawful sale of a commission: bill also to be delivered up to be cancelled).

might under some circumstances be given relief in the public interest lingers a little longer in equity than at law,[20] but in *Ayerst* v. *Jenkins* (1873) Selborne L.C. clearly states that the maxim about *par delictum* is not opposed to any equity.[21] The one special equitable exception that has survived is that of marriage brokage contracts.

It was equity that introduced the rule that all marriage brokage agreements are illegal and void.[22] Third parties must not reap reward for bringing about marriages, whether they be parents,[23] or guardians, or persons such as servants who have gained influence over the parties: *Cole* v. *Gibson*,[24] the case before Hardwicke L.C. of the nursery maid, who was alleged to have obtained such a control over her young mistress that she read the letters of all suitors, and was promised a douceur by one of them. In England such agreements are illegal whether the match contracted be in fact a proper one or not, in view of the dangerous consequences that may flow from such agreements,[25] and it makes no difference that the service rendered consists in offering a number of possible names from whom selection may be made.[26] Although equity insists that such agreements are illegal, it has for long permitted recovery of sums paid, even though the marriage has actually taken place.[27]

In India the rules as to the illegality of marriage brokage contracts are somewhat relaxed in favour of the broker in some states. Promises to anyone other than a parent or guardian to make payments to procure marriages are void.[28] Omnipotent nursery maids and marriage brokage agencies are left empty handed as in England, and the High Courts of Bombay, Calcutta, Madras, Patna and Lahore put parents and guardians on the same footing.[29] It is, however, traditional in India that marriages be arranged by parents

[20] *Palmer* v. *Neave* (1805) 11 Ves.Jun. 165 (bond by bridegroom to indemnify father, who had settled annuity on bride); *St. John* v. *St. John*, *ibid.*, p. 525 (instrument of future separation); *The Vauxhall Bridge Co.* v. *Earl Spencer* (1821) Jac. 64, 67, where Eldon L.C. thought monetary restitution a possibility, cited Grodecki, 272.

[21] L.R. 16 Eq. 275, 283.

[22] See R. Powell, (1953) *Current Legal Problems*, 254, 259–262.

[23] *Keat* v. *Allen* (*supra*, n. 19).

[24] (1750) 1 Ves.Sen. 504—it was ultimately held that there was a valid basis to support the promise in the shape of real affection and regard: Ves.Sen.Supp. 211.

[25] *Ibid.*, at p. 506.

[26] *Hermann* v. *Charlesworth* [1905] 2 K.B. 123, following *King* v. *Burr* (1810) 3 Mer. 693.

[27] *Goldsmith* v. *Bruning* (1700) (*supra*, n. 19).

[28] *Pitamber* v. *Jagjiwan* (1884) 13 Bom. 131; *Vaithyanathan* v. *Gungarazu* (1893) 17 Mad. 9.

[29] *Dholidas* v. *Fulchand* (1897) 22 Bom. 658; *Baldeo Das* v. *Mohamaya* (1911) 15 Cal.W.N. 447; *Kalavagunta* v. *K. Lakshmi* (1908) 32 Mad. 185 (F.B.); *Dharnidhar* v. *Kanhji Sahay*, A.I.R. 1949 Pat. 250; *Abbas Khan* v. *Nur Khan* (1920) 1 Lah. 574.

or guardians, and until recent years the wishes of the parties rarely had anything to do with the matter. Child marriage was not against the law until 1929.[30] It is, therefore, not surprising to find that the High Courts of Allahabad and Orissa have no rule of absolute illegality, but examine the circumstances of each case, and enforce an agreement to pay money to a parent or guardian, if he was seeking an eligible spouse for the child. There is also a difference of opinion whether to enforce promises to pay money to the bride or groom in consideration of the match. In Madras, where payments even to parents are inevitably illegal, a promise to one of the parties to the marriage has been held valid,[31] but in Orissa, where promises to parents are merely scrutinised, a similar scrutiny is exercised over promises to parties, and a promise will be invalidated if it provided the sole consideration for the marriage.[32]

Once the marriage has taken place, recovery of marriage brokage money or property from the broker is denied in India, the rule of English equity not being followed. This rule against restitution applies both in the states where such payments are completely illegal,[33] and also in the areas where a payment to a parent acting for his child's welfare is valid, if the circumstances show he was not so acting.[34]

Another situation where the defendant is not all powerful is when he is estopped from pleading his own illegality. *Nemo suam turpitudinem allegans audiendus est* is a maxim as widely used as that about *par delictum*. The former maxim is often prayed in aid to stifle the mouth of the plaintiff, but in *Montefiori* v. *Montefiori* (1762), only two years after he had introduced the latter maxim, Lord Mansfield silenced a defendant with the former maxim. A general doctrine that a defendant cannot plead his own turpitude would eliminate or counterbalance the rule about *par delictum*, and it is suggested that it is only in exceptional circumstances that a defendant cannot raise the plea.[35] In the 1762 case,

30 The Child Marriage Restraint Act, Act XIX of 1929.

31 *Narayan Nambudri* v. *Patticharavoor*, A.I.R. 1945 Mad. 165.

32 *Suryanarayan* v. *Krishna*, A.I.R. 1957 Or. 125—it was found that P1 was induced to marry P2, a widow, only by a promise of land, jewels and ornaments from D, the maternal uncle of P2. After the marriage P1 sued D in vain to recover these articles, as it was held that P1 entered into the marriage only for these mercenary reasons.

33 *Kalavagunta* v. *K. Lakshmi* (1908) 32 Mad. 185, 190, *per* White C.J. *obiter*, delivering the Full Bench Judgment in the case that decided that all such agreements were illegal in Madras (*supra*, n. 29); *Ram Sumran Prasad* v. *Gobind Das* (1926) 5 Pat. 646 (bench); *Dharnidhar* v. *Kanhji Sahay*, A.I.R. 1949 Pat. 250, 255, *per* Ramaswami J.; *Alsidas* v. *Punamchand* (1944) Nag. 535, 538, *per* Grille C.J.

34 *Gopi Tihadi* v. *Gokhei Panda*, A.I.R. 1954 Or. 17, 23, *per* Panigrahi C.J.

35 One view is that the maxim about *par delictum* is an exception to the general rule that no one can plead his own turpitude: *per* Tek Chand J. in *Qadir*

the interests of an innocent third party would have been prejudiced had the plea been permitted. Jo. was engaged to be married. To represent him as affluent, his brother Mo. gave him a note for a large sum, as the balance of accounts between them, when in fact there was no such balance. After the marriage, Mo. reclaimed the note, as without consideration, and arbitrators decided it must be delivered up, but his Lordship, setting aside their award, said: "It shall be as represented to be, for no man shall set up his own iniquity as a defence, any more than as a cause of action."[36] The explanation of this decision seems to be that otherwise the innocent wife of Jo. would lose her legitimate expectations: a form of estoppel was in operation.[37] Apart from special cases, it must be the general rule that a defendant can plead his illegality, for the court itself will take notice of illegality if it comes to light, though pleaded by neither party.[38] Two cases of Lord Mansfield's time may be mentioned, where defendants escaped liability by the plea: *Collins* v. *Blantern* (1767), a suit on a bond in answer to which Wilmot C.J. accepted the defence of illegality of consideration, and stressed the absurdity of any other rule,[39] and *Holman* v. *Johnson* (1775), where Lord Mansfield himself permitted a defendant *in pari delicto* to plead illegality, observing that any benefit to him was an accident, and that it was public policy that required cognisance to be taken of such a plea.[40]

As mentioned above, as early as 1687, long before Lord Mansfield had introduced a charter for the defendant in the maxim about *par delictum*, a court of equity had indicated that a plaintiff might be relieved where the agreement was still executory.[41] This is today a well-recognised exception to the maxim, but its limits are still not clearly defined. A requirement that the illegal purpose be completed before the *locus poenitentiae* is lost would plainly be too lenient towards the plaintiff, as Fry L.J. convincingly

Bakhsh v. *Hakam* (1932) 13 Lah. 713, 724–725. On this analysis, the *Montefiori* case would have to be regarded as illustrating an exception to the maxim as to *par delictum*.

[36] I Black. W. 363.

[37] The case is so explained in the leading case of *Jorden* v. *Money* (1854) 5 H.L.C. 185, *per* Lord Cranworth at pp. 210–211, *per* Lord Brougham at pp. 225–226, *per* Lord St. Leonards at pp. 251–252.

[38] Provided it is satisfied that the whole of the relevant circumstances are before it: *N. W. Salt Co.* v. *Electrolytic Alkali Co.* [1914] A.C. 461, 469; *Edler* v. *Auerbach* [1950] 1 K.B. 359, 371–372; *Scott* v. *Brown* [1892] 2 Q.B. 724, 728; *Re Robinson's Settlement* [1912] 1 Ch. 717, 725. Indian law is the same—see cases cited by Pollock and Mulla, *Indian Contract Act* (1957) 8th ed., 199 (*a*).

[39] *Supra*, n. 4, at p. 351.

[40] 1 Cowp. 341.

[41] *Supra*, n. 14.

illustrates in *Kearley* v. *Thomson*.[42] The question is probably best treated as one of fact, the criterion being whether matters have gone too far for the plaintiff to countermand or revoke. It is submitted that in cases where the parties have in mind some third party as victim, as long as the affair has not gone beyond the stage of preparation between the two guilty parties, however extensive that may be, the law should allow revocation, but as soon as contact has been made with the intended victim, it is usually too late for the plaintiff to repudiate.[43] On this basis, it is suggested that the mere fact that the plaintiff has transferred the ownership of some piece of property to the defendant to further an illegal purpose should not preclude restitution, so long as the illegal object has not been even partially performed. Suppose that, to defraud his creditors, A transfers his land to B, his mistress, by a sale deed reciting a fictitious consideration, B being in the plot, and next day demands a reconveyance. His title has passed, but not, it is submitted his *locus poenitentiae*. Street takes a contrary view in his criticism of *Symes* v. *Hughes*,[44] citing Blackstone: "A contract executed conveys a chose in possession; a contract executory conveys only a chose in action."[45] The facts of *Symes* v. *Hughes* differ from the hypothetical case just given in that A did not seek to recover for nearly three years after the conveyance. B had in the meantime conveyed to D, who sued A at law to recover the title deed, still in A's possession. While the case was pending, A was adjudicated bankrupt, and with the approval of his creditors was allowed to prosecute the suit, on the understanding that if he won he would pay a composition of half a crown in the pound. Romilly M.R. held for A. Street objects that the matter can hardly be described as still executory in view of the conveyance to B, and also the lapse of time. It is submitted that the first objection is not a conclusive one, and this view is supported by the Privy Council decision in *Petherperumal* v. *Muniandi Servai*,[46] where recovery was permitted although the formal title had passed to the defendant, while the second objection would have been decisive had not A been acting expressly for the benefit of his creditors.[47]

The method of drawing the distinction between executory and executed here proposed may be tested by reference to the facts of

[42] (1890) 24 Q.B.D. 742, 747; "Suppose a payment of £100 by A to B on a contract that the latter shall murder C and D. He has murdered C but not D. Can the money be recovered back? In my opinion it cannot be."

[43] The requirement of "partial performance in a substantial manner" laid down by Fry L.J. (*ibid.*) must still be satisfied.

[44] (1870) L.R. 9 Eq. 475.

[45] Comm. ii, xxx, 443, cited Street 473.

[46] (1908) 35 Cal. 551; 24 T.L.R. 462 (appeal from Lower Burma).

[47] *Infra*, n. 92.

Apthorp v. *Neville*,[48] where P had paid D £50 to print a manuscript that both P and D's agent knew to be libellous. After half the work had been done, D refused to go on, and was held entitled to keep the money, on the ground that there had been part performance. It is submitted that recovery should not be refused for part performance of this kind. On the facts P was properly denied relief because the countermand came not from him but from D.[49] If P had countermanded, it is submitted he should recover, in that no irrevocable harm has yet been done, and the matter is not beyond recall. D has done work for nothing, a fit penalty for engaging in such a bargain, but no innocent person has yet been damaged. If the line is drawn as here suggested, it provides justification for the English rule that even though the agreement is still executory, the plaintiff cannot recover where the performance of the illegal object has been frustrated by the other party or by extraneous circumstances. This examination of the reasons why the illegal purpose has been unfulfilled is a comparatively recent tendency, but it is now established that if the scheme has failed only because of the vigilance of third parties,[50] or a change of mind on the part of the defendant,[51] or mere inaction and failure on the latter's part to perform within the time stipulated,[52] the plaintiff loses his *locus poenitentiae*. In India, on the other hand, the plaintiff can rely on his *locus poenitentiae* provided the illegal purpose has failed, and the court does not investigate the reasons for such failure.[53] Grodecki prefers the Indian rule,[54] but taken in conjunction with the test of an executory agreement suggested above, the English rule seems admirably designed to ensure that there is less likelihood of honour among those *in pari delicto*. To revert to the situation in *Apthorp* v. *Neville*,[55] the printing press is working on the defamatory document. P knows that whoever is the first to countermand will get the fifty pounds. If he wants this money back, he must act quickly. D has an incentive to resile: he will do no printing and yet retain the full price. Under the Indian rule, however, P can rest content, for he knows that he will receive either his money, or the piece of printing he ordered, while D, once he has begun the work, knows that his

[48] (1907) 23 T.L.R. 575.
[49] *Infra*, n. 51.
[50] *Alexander* v. *Rayson* [1936] 1 K.B. 169 (C.A.).
[51] *Bigos* v. *Bousted* [1951] 1 All E.R. 92, 101.
[52] *Harry Parker* v. *Mason* [1940] 2 K.B. 590, 602, *per* Mackinnon L.J.
[53] *Petherperumal* v. *Muniandi Servai*, n. 46 (*supra*); *Tirupathi* v. *Lakshamana*, A.I.R. 1953 Mad. 545, 547, not following *Bigos* v. *Bousted*, *supra*, n. 51. See however *Raghuber Das* v. *Nataber Singh* (1919), cited *infra*, n. 62.
[54] At p. 263.
[55] *Supra*, n. 48.

only hope of keeping the money is to complete the job, and fulfil the unlawful purpose.

According to dicta in *Tappenden* v. *Randall* (1801), despite the fact that the agreement is still executory, recovery will be denied, in the view of Lord Alvanley, where there is moral turpitude, or in the words of Heath J.: "if the contract is of a nature too grossly and obviously immoral for the court to enter into any discussion of it." [56] In subsequent English cases, there is no more than an occasional reference to the possibility of some such limitation on recovery,[57] but there are two Indian bench decisions where the opportunity to repent has been denied on moral grounds. In *Ledu Coachman* v. *Hiralal Bose*,[58] P sought to recover Rs. 150 paid to the Nazir of a District Court, in consideration of a promise to procure the appointment of P's son as permanent peon, but the claim was rejected by the court, who referred to Lord Alvanley's dictum, and emphasised the enormity of the offence. Place brokage should certainly be deterred, even where the appointment in question is as humble as that of court peon, a sort of usher and messenger. A not dissimilar bribe seems to have been recovered in *Law* v. *Law* (1735),[59] but corruption is probably regarded as more heinous today than in the eighteenth century. In an Australian case, a bribe was recovered back, but this was a bribe to support a genuine claim and not so reprehensible morally.[60] *Ledu Coachman* was rejected in the following year on the ground that section 23 of the Indian Contract Act draws no such distinction, and that even in England the *Tappenden* dicta had not affected later cases.[61] *Ledu Coachman* was, however, followed in *Raghuber Das* v. *Natabar Singh*,[62] another bribery case, but especially reprehensible, as it involved an attempt to corrupt the Guru or spiritual adviser of a Rani into persuading her to adopt the plaintiff's son. The plaintiff paid Rs. 5,000 to the Guru, the adoption to be brought about within two years. After two years had elapsed, the plaintiff sued to recover in vain, the court describing the agreement as "grossly immoral." A further ground for the decision was that

[56] 2 B. & P. 470–471.

[57] References by counsel in *Harry Parker* v. *Mason* (*supra*, n. 52), at p. 596, and in *Parkinson* v. *College of Ambulance* [1925] 2 K.B. 1, 7–8, and by Lush J., at p. 13.

[58] (1916) 43 Cal. 115.

[59] *Supra*, n. 19. Lord Mansfield permitted recovery of a bribe in *Walker* v. *Chapman* (1773) Lofft. 342, but not in *Browning* v. *Morris* (1778) 2 Cowp. 790. Grodecki considers his Lordship changed his mind: 257, n. 31, but the contemporary explanation was that in the earlier case the matter was still executory: *per* Buller J. in *Lowry* v. *Bourdieu* (1780) 2 Doug. 468, 471.

[60] *Armitage* v. *Smith* (1873) 4 A.J.R. 175 (Supreme Court of Victoria).

[61] *Srinivasa* v. *Sesha* (1917) 41 Mad. 197, 200–201, *per* Oldfield J.

[62] A.I.R. 1919 Pat. 316.

the plaintiff had never repudiated, but was in substance claiming damages for non-performance, the time limit having expired. This second ground is reminiscent of the English view, illustrated by cases cited above,[63] but not generally followed in India,[64] that there is no true repentance and therefore no recovery, where the agreement has remained unexecuted only because the defendant has failed to do his bit. On the main point of refusal of restitution on account of gross immorality, Panigrahi C.J. of the Orissa High Court has recently indicated that he is not prepared to go as far at present.[65]

The very words of the maxim *in pari delicto* disclose one of the limitations to its operation: it will not apply where the plaintiff is not as guilty as the defendant. It is well known that if the plaintiff was acting under duress or oppression, or was misled by the fraud of the defendant, or is a member of a protected class, he can ask the court to undo the transaction. It was at one time the view of equity that a successor in title of one *in pari delicto* was not under the same disability as regards suing; *Matthew* v. *Hanbury* (1690).[66] This view was rejected by Selborne L.C. in *Ayerst* v. *Jenkins*,[67] but has received the approval of some Indian courts, without reference to the later English decision.[68]

If the plaintiff cannot secure restitution by bringing himself within any of the exceptions already considered,[69] the most vital question is that of title. The maxim "let the estate lie where it falls,"[70] gives a remarkably accurate picture of English law. The title protected is sometimes a prior rightful title of the original owner, and sometimes a title conferred on a transferee for some unlawful purpose. The law may first be stated in a number of propositions:

1. If the plaintiff merely delivered possession to the defendant, without transferring any title, either general or special, he can recover on the strength of his title.
2. He can also recover if he made a purported transfer, but statute declares such a transfer void.
3. If he has created a limited interest, *e.g.*, by way of lease,

[63] nn. 51, 52.
[64] n. 53.
[65] A.I.R. 1954 Or. 17, 21.
[66] *Supra*, n. 16.
[67] (1873) L.R. 16 Eq. 275, 281.
[68] *Sidlingappa* v. *Hirasa* (1907) 31 Bom. 405; *Sabava* v. *Yamanappa*, A.I.R. 1933 Bom. 209. In *Vilayat Hussain* v. *Misran* (1923) 45 All. 396, 400, Mears C.J. takes a contrary view, without referring to any authority, English or Indian.
[69] Not all the exceptions have been considered: Street lists as many as ten: *op. cit.* 488.
[70] See *per* Eldon L.C. in *Muckleston* v. *Brown* (1801) 6 Ves. 52, 69.

bailment or lien, he can recover only if he can defeat this interest by some means other than pleading the illegality of the transaction.

4. If he has transferred a full title and also possession, the defendant is secure, apart from two exceptional cases.
5. If he has transferred a full title, but not possession, the defendant can recover possession from him.

The first proposition is illustrated by *Bowes* v. *Foster*,[71] where, to defraud his creditors, A delivered his goods to B, but executed no instrument whereby any title would pass. It was held that he could recover, and the question whether the matter was still executory was not even considered. The famous and difficult case of *Taylor* v. *Bowers* falls into the same category. This is invariably treated as a case where the court permitted recovery as the illegal agreement was still executory, a finding sometimes considered difficult to justify as the steps to defeat creditors had gone so far.[72] It is overlooked that no actual assignment by the plaintiff was ever made; he merely delivered possession.[73] It was therefore open to the plaintiff to recover on the strength of his title, even allowing that the attempt to deceive creditors was well on the way to fruition. Of the five judges, it is clear that James L.J. bases his decision on the plaintiff's subsisting title.[74]

The second proposition is illustrated by *Doe* v. *Howells*,[75] where the grantor executed a deed purporting to grant a lease of sixty years to the grantees for charitable uses. Such a deed was declared absolutely null and void by statute unless inrolled within six months. In the absence of inrolment, it was held that the grantor could ignore this deed. In *Doe* v. *Ford* [76] it was held that it was open to the grantor of an annuity deed to prove that the value of the land, on which the annuity was charged, had been deliberately overstated to escape a statutory provision requiring a memorial to be inrolled. The statute provided that a deed not inrolled should be void. The grantor, by proving the true value,

71 (1858) 27 L.J.Ex. 262.

72 *Per* Fry L.J. in *Kearley* v. *Thomson* (*supra*, n. 42), at p. 746.

73 (1876) 1 Q.B.D. 291, 293, reporter's note (I).

74 "The plaintiff is not obliged to state a fraud of his own as part of his title. All the plaintiff has to say is: 'These were my goods. I was possessed of them in 1868. I have never parted with them to anybody. They are my goods still. I never sold them, and I have never given them to anybody in such a way as to deprive myself of the right to possession of them.' It is the defendant who has got really to show the fraud . . . the case of *Bowes* v. *Foster* seems to me entirely on all fours": at p. 298. Grove J., at p. 301, though not so definite, does remark that plaintiff is "repudiating the fraud and setting up his own prior rightful claim as owner of the goods."

75 (1831) 9 L.J.(o.s.)K.B. 332.

76 (1835) 3 A. & E. 649; 5 L.J.(o.s.)K.B. 25.

was able to establish that no estate passed to the grantee, the deed being void by statute, and thus recover possession.

The third proposition is illustrated by the leading case of *Taylor* v. *Chester*, where it was held that a pledge of half a banknote with a brothel-keeper as security for food and drink supplied and money lent to further an orgy, could not be defeated by the pledgor's plea of illegality, and Mellor J. observed: "The test for determining whether or not the plaintiff and defendant were *in pari delicto*, is by considering whether the plaintiff could make out his case otherwise than through the medium and by the aid of the illegal transaction to which he was himself a party."[77] The indication that, subject to the proviso, such a plaintiff can recover by relying on his residual ownership is confirmed by *Bowmakers* v. *Barnet Instruments*; "In our opinion a man's right to possess his own chattels will as a general rule be enforced as against one who, without any claim of right, is detaining them or has converted them to his own use, even though it may appear either from the pleadings, or in the course of the trial, that the chattels in question came into the defendant's possession by reason of an illegal contract between himself and the plaintiff, provided that the plaintiff does not seek, and is not forced, either to found his claim on the illegal contract or to plead its illegality in order to support his claim."[78] The operation of this rule is shown by contrasting *Taylor* v. *Chester* with *Bigos* v. *Bousted*; in the former case, the pledgor had received consideration, albeit an immoral one, but in the latter no loan of any sort was advanced, and, therefore, the pledgor could have pleaded that no advance was made, and left the defendant to plead illegality.[79] The reason for restitution in this type of case is that the plaintiff is relying on a prior rightful title, but, as has been seen, Mellor J. treats the situation as one where the parties are *impar*. Under this test, the examination of parity of *delictum* is conducted from an entirely artificial and technical standpoint, quite distinct from the ordinary meaning of parity of *delictum*, where the merits of the parties are in some degree considered.[80] This procedural test may lead to difficulties,[81] but its enormities have been exaggerated by a failure to confine it within its legitimate sphere, that is to cases where the plaintiff is relying upon title, for, as has been seen, generally speaking the defendant can plead illegality and yet win his case.[82] It has, however, been confused

[77] (1869) L.R. 4 Q.B. 309, 314.
[78] [1945] K.B. 65, 71 (C.A.).
[79] *Supra*, n. 51. See the analysis in Paton, *Bailment*, 35–36: in fact the plaintiff (strictly he was defendant in the action) never relied upon his title.
[80] *Supra*, n. 66.
[81] See Hamson, *op. cit.*
[82] *Supra*, n. 35.

with the older, more general rule, that a plaintiff must not make out his claim by going into proof of an illegal transaction. This rule is a general formula cited in Smith's *Leading Cases*, and there supported by reference to six cases, apart from *Taylor* v. *Chester*, two earlier and four subsequent.[83] In none was any question of title involved: four were suits to recover back money paid under an illegal agreement, and the fifth and sixth to recover the proceeds and to recover expenses respectively arising from such an agreement. In such cases, the test is not technical, artificial or procedural, except that it shows a general predilection towards the defendant. It matters not that it is the defendant who pleads the illegality, or that it comes to the notice of the court, without having been pleaded.[84] Failure to realise that in *Taylor* v. *Chester* Mellor J. is citing an old rule, but making a new departure whereby it is absolutely vital which party has to plead the illegality, has perhaps contributed to a misunderstanding in India of the judgment of Mellor J.,[85] has led to extravagant criticism of the English rules,[86] and also to a false analysis of at least one case. As to the latter, Grodecki cites *Berg* v. *Sadler*[87] as a case where the test of Mellor J. was not applied, since recovery was denied although, even as a matter of form, it was the defendant who alleged the fraud.[88] There P, who was on the stop list of certain cigarette manufacturers, tried to obtain supplies from D, a wholesaler, by using an intermediary, who was to pretend, falsely, that the latter personally required the goods. The latter ordered cigarettes, and paid over money given him by P, but before delivery, D discovered the fraud, and P sued him in vain for the return of the money. It was the defendant D who pleaded that P's activities were criminal, but this was not a case to which the procedural test of parity of *delictum* applied: P had no residual title to the money, for the ownership of cash normally passes on delivery, and a voluntary payment is generally irrecoverable. It has just been noticed that in such cases it matters not that it is the defendant who pleads the illegality.[89] It is further submitted that even if the facts of *Berg* v. *Sadler* are varied somewhat to have the semblance of a *Taylor* v.

[83] Smith, 13th ed., (1929), 445. *Simpson* v. *Bloss* (1816) 7 Taunt. 246; *Fivaz* v. *Nicholls* (1846) 2 C.B. 501; *Begbie* v. *Phosphate Sewage Co.* (1875) L.R. 10 Q.B. 491, 500; *Kearley* v. *Thomson* (*supra*, n. 42); *Scott* v. *Brown* [1892] 2 Q.B. 724; *Farmers' Mart* v. *Milne* [1915] A.C. 106.

[84] In the *Milne* case the defendant pleaded the illegality, in *Fivaz* Maule J. indicates that the result would be the same had he done so: at p. 514, and in the *Scott* and *Begbie* cases, the court took notice of it, though pleaded by neither party.

[85] *Infra*, n. 14.

[86] See Grodecki, 270: "... a formal, procedural test to be applied in all cases."

[87] [1937] 2 K.B. 158 (C.A.).

[88] At p. 270, n. 7.

[89] *Supra*, n. 84.

Chester situation, the procedural test will still yield a finding for the defendant. Suppose that, instead of cash, P had handed D a silver cigarette box as security for payment. If P and D were *in pari delicto*, P could recover on the strength of his title, but D is innocent. P pleads his ownership, D replies that the box is an unredeemed pledge, P pleads that no goods were ever supplied, and D pleads the illegality. It is suggested that D is entitled to raise the point of illegality, since he is not infringing the maxim *nemo suam turpitudinem allegans audiendus est*, as he is pleading not his own fraud but the criminal activities of P, who was trying to dupe him.[90]

The fourth proposition is in accord with the maxim about *par delictum*, as Selborne L.C. acknowledged, when he decided *Ayerst* v. *Jenkins*.[91] H a widower, agreed with B, his deceased wife's sister, to cohabit with her after a marriage necessarily invalid, as the parties were, under the law then, within the prohibited degrees. Two days before the marriage, H conveyed shares to trustees for the benefit *inter alios* of B for life. H died four months later, but B enjoyed the benefit for nine years before her marriage with X, and then a further two years elapsed before H's legal representative questioned the transaction. The decision was for B. While the settlor or his executors cannot impeach such a settlement after the illegal purpose has been accomplished, creditors of the transferor can do so,[92] and in a case very similar to *Ayerst's* case it has been held that if the trustees ask the court for directions the court will declare the trusts void, and order payment to the next beneficiaries if they are not tainted with the unlawful object.[93] Strangers, who are not concerned in the illegal dealings, cannot seek to retain property as against the transferee by pleading the tainted relations that induced the transferor to vest the property in him.[94]

[90] There is one anomalous case where an innocent defendant will lose, though if guilty he would win. If D has received on behalf of P money from X under an illegal agreement between X and P, D cannot refuse to pay to P if innocent: *Tenant* v. *Elliott* (1797) 1 Bos. & P. 3; *Farmer* v. *Russell* (1798) 1 Bos. & P. 296.

[91] *Supra*, n. 67.

[92] *Bessey* v. *Windham* (1844) 6 Q.B. 166; *Symes* v. *Hughes* (*supra*, n. 44) is a similar case as the transferor was suing on behalf of his creditors and with their approval.

[93] *Phillips* v. *Probyn* [1899] 1 Ch. 811. The facts are similar to those of *Ayerst*, and also the terms of the settlement, except that in *Ayerst* the settlor was more generous to the lady: (i) he did not make her life interest depend on her remaining unmarried; (ii) after her life interest, he gave her a power of appointment instead of himself; and (iii) the ultimate trust was for her next-of-kin, instead of, in substance, for his.

[94] *Gordon* v. *Chief Commissioner of Police* [1910] 2 K.B. 1080 (C.A.). The police seized money from a house occupied by P's servant. P and others were prosecuted for having used the house as a betting house. P was acquitted though others were convicted. P sued for the return of the money, claiming that the money was the result of illegal street betting, and won. Street

The fifth proposition is based upon *Doe d. Roberts* v. *R.*[95] X conveyed land by deed to P his brother, to achieve two secret unlawful purposes, first to give P a qualification to kill game, and secondly to get rid of a criminal information pending against P. X remained in possession, and later died. It was held that P could recover possession from X's widow. Another English case where the transferee is confirmed in his new title, though it springs from an illegal transaction is *Phillpotts* v. *Phillpotts.*[96] The deceased conferred a rentcharge for life upon his son to secure an annuity. The ulterior purpose was to provide for multiplicity of votes, contrary to statute. It was held that the son could sue his father's estate for arrears of the annuity. Of course, if an annuity had been conferred simpliciter for an illegal purpose, it would be no more recoverable than the sum due on the bond in *Collins* v. *Blantern*,[97] but there has been a grant of real property, a rentcharge, and with the title that passes despite the illegality passes also the right to sue for the money secured thereby.

Pitt Taylor does not accept the decision in *Doe d. Roberts* v. *R.* In his view it is now clearly settled that a party is not estopped by his deed from avoiding it by proving that it was executed for an unlawful purpose. It is submitted that this is true only of *promises* under seal, such as cases on bonds relied on by Taylor,[98] and not of *transfers* under seal.[99] The passage in Pitt Taylor[1] has been largely responsible for the decisions of some Indian courts rejecting *Doe d. Roberts.*[2] Such courts also rely on a Privy Council case: *Ram Surun Singh* v. *Mst Pran Peary*,[3] which was a suit for possession of land through the medium of foreclosure. The defence was a denial of execution of the mortgage deed and of the stated consideration. The defence pleaded with success that the fictitious

criticises (491), and would deny relief even had the seizure been from P's own house. But even if the money had been *res nullius*, the case put by Street (485), P's anterior possession must be protected against deprivation without any claim of right. In Australia a similar view has been taken: *Strang* v. *Owens* (1925) 42 W.N.(N.S.W.) 183 (Supreme Court of New South Wales)—money earned in an immoral business can be recovered from the defendant to whom the owner gave it upon trust for herself.

95 (1819) 2 B. & Ald. 367.

96 (1850) 2 C.B. 85.

97 *Supra*, n. 4.

98 *Collins* v. *Blantern*, *ibid.*; *Prole* v. *Wiggins* (1836) 3 Bing.(N.C.) 230; *Paxton* v. *Popham* (1808) 9 East 408.

99 Except where the statute declares the transfer null and void, as in *Doe* v. *Howells* and *Doe* v. *Ford* (*supra*, nn. 75, 76). Pitt Taylor regards these as in conflict with the *Roberts* case, but without justification: propositions 2 and 5 are not in conflict.

1 Taylor, *Evidence* (1931) 12th ed., 88–89.

2 *Luckmidas Khimji* v. *Mulji Canji* (1881) 5 Bom. 295; *Qadir Bakhsh* v. *Hakam* (1932) 13 Lah. 713 (F.B.). Other cases rejecting *Roberts* are *Vilaiyat Hussain* v. *Misran* 45 All. 396; *Raghupati Chatterjee* v. *Nrishingha* A.I.R. 1923 Cal. 90.

3 (1870) 13 M.I.A. 551.

deed was to defeat creditors. In a very brief judgment, James L.J. does observe that it is open to the grantor to show the real truth and to deny the money was advanced, but it is submitted that a mortgage transaction is governed by proposition 3 and not proposition 5, as it does not purport to convey a full but only a limited title. The mortgagor relies upon his original title, and if the mortgagee pleads that the debt is unpaid, the mortgagor will reply that no debt was ever advanced, leaving the mortgagee to plead the illegality, and so lose his case. The situation is analogous to that of *Bigos* v. *Bousted* as analysed by Paton.[4] There may be an argument valid in India for rejecting the *Roberts* case, and denying the *benamidar* transferee a remedy. The system of *benami* transactions is ancient among Hindus and Muslims, and this might lead the courts to have more sympathy with an owner who has vested nominal ownership in another, even though the object is illegal. However, some of the courts antagonistic to the *Roberts* case prefer not so much to assist the real owner as to encourage a sort of legal stalemate or vacuum. In one case, P had executed a fictitious sale deed in favour of D to defeat his creditors. Benson J. refused his action for a declaration that he was entitled to remain on the register as landowner, and indicated that D, for his part, would not be able to recover possession from P.[5] Other Indian courts follow the *Roberts* case.[6]

The position of *Ayerst* v. *Jenkins*, the basis of proposition 4, is also uncertain in India. There is a statutory provision that no transfer can be made for an unlawful object or consideration.[7] If this is interpreted as meaning that such transfers are absolutely null and void, the grantor can recover, proposition 2 being the one applicable, based on *Doe* v. *Howells*. Some courts in India so construe the statute,[8] while others interpret it as meaning simply that the law will not enforce such transfers, and continue to apply *Ayerst's* case.[9] Some courts have distinguished *Ayerst's* case by confining it to cases of gift, as distinct from transfers that allege a monetary but in fact fictitious consideration. This is to misread

[4] *Supra*, n. 79. There is one difference in the *Bigos* case: Bousted had executed no document reciting that Bigos had advanced the lire.

[5] *Yaramati Krishnayya* v. *Chundru Papayya* (1897) 20 Mad. 326, 332.

[6] *Sidlingappa* v. *Hirasa* (1907) 31 Bom. 405 (bench); *Kotayya* v. *Mahalakshamma* (1933) 56 Mad. 646. *Brackenbury* v. *B.* (1820) 2 J. & W. 391 is cited by both protagonists. It seems to support *Roberts*—the nominal owner, suing as plaintiff, will be defeated only if there is some flaw in his case other than the illegality. *Contra*, *per* Tek Chand J., in *Qadir Bakhsh* (*supra*, n. 2), at p. 739.

[7] s. 6 (*h*), Transfer of Property Act, 1882.

[8] *Istak Kamu* v. *Ranchhod Zipru* (1947) Bom. 206.

[9] *Deivanayaga Padayachi* v. *Muthu Reddi* (1920) 44 Mad. 329, 332, *per* Abdur Rahim J.

the judgment: Lord Selborne's references to completed gift are merely to contrast the position with the case of a mere bond or covenant, which, being for an unlawful consideration, cannot be enforced.[10] A case based on such a misreading is *Thasi Muthukannu* v. *Shunmugavelu Pillai*,[11] where P, an inexperienced youth of 20, but yet a major under Indian law, assigned a mortgage to D for a consideration stated to be monetary, but actually to consist of future illicit intercourse with A, D's sister, and like her a prostitute dancing girl. Shortly after the assignment, A discontinued any relations with P, and he sued with success for the return of his property, partly because he was not *in pari delicto*, and also because *Ayerst* was confined to cases of completed gift.

It is not clear whether proposition 3, based on *Taylor* v. *Chester*, is law in India. There is a contemporary case that seems to be to the contrary,[12] a recent dictum quotes it, as stated in *Bowmakers'* case, with approval,[13] and in a third case it is misunderstood.[14] In the last-mentioned case, it is observed that where the plaintiff has to produce a document, the defendant may cross-examine him or issue interrogatories to show that he is *in pari delicto*. But the essence of the test is a *procedural* one: the plaintiff may be deeply dyed with guilt, but is nevertheless permitted to reclaim his own property, provided he does not have to *rely* upon the illegality as an integral part of his case. What he may be constrained to admit under cross-examination is one thing, and what he needs must allege as the basis of his pleading is another. If he can prove a title that the defendant can defeat only by pleading illegality, the plaintiff will obtain restitution.

Thus it is not clear whether Indian law will accept the English propositions 3, 4 and 5. An attempt has been made here to reconcile the English cases and to indicate the present state of English law. A more fundamental question is whether the English rules produce injustice and whether they are really calculated to further

[10] As, *e.g.*, in *Collins* v. *Blantern* (*supra*, n. 4).

[11] (1905) 28 Mad. 413.

[12] *Alla Baksh* v. *Chunia* (1877) Punj.Rec. no. 26. The report does not seem to be available in England, but the case is cited in Pollock and Mulla, *op. cit.*, 175, for the proposition that ornaments lent by a brothel-keeper to a prostitute for attracting men and encouraging prostitution cannot be recovered back. *Cf. per* Martin B. in *Pearce* v. *Brooks* (1866) 1 Ex. 213, 217, criticised by Hamson, *op. cit.*, at p. 254. Recovery might be denied even in England on the ground of gross immorality: there are indications in *Bowes* v. *Foster* (n. 71, *supra*), at p. 264, that this may prevent reliance even on title, just as according to Heath J. in *Tappenden* v. *Randall* (*supra*, n. 56) a plaintiff may fail to recover on an executory agreement if grossly immoral. Recovery is clearly impossible if the goods have no lawful use, *e.g.*, obscene books: *Bowmakers* v. *Barnet* [1945] K.B. 65, 72.

[13] *Haji Habib* v. *Bhikamchand*, A.I.R. 1954 Nag. 306, 314, 316, 318.

[14] *Vilaiyat Hussain* v. *Misran*, 45 All. 396, 399, *per* Mears C.J.

public policy. Street supports his opinion that the maxim about *par delictum* has been productive of grave injustice by reference to three cases.[15] The second case is an odd choice, as the plaintiff was allowed to recover the hire of an automatic machine, as the game playable on the machine was held one of skill. In the first case there was no recovery by an advertising agent as the advertisements inserted by him on the defendant's instructions were held to relate to a lottery. A study of these two cases leads to the conclusion that the injustice springs from the fine line of distinction between games of skill and chance, and that if any Latin maxim is to be deprecated it is *ignorantia juris haud excusat*, especially when, as in the first case, it appears in the inaccurate and objectionable form that everyone is presumed to know the law.[16] The third case, where the insured person had entered into a policy both *ultra vires* the insurers and also void by statute, and failed to recover the premiums, scarcely arouses feelings of indignation in the mind. It is easy to employ such emotive expressions as "grave injustice," but more difficult to substantiate them, and the phrase itself sounds somewhat peculiar in a context where by and large there is usually fault on both sides. Grodecki and Hamson adopt a more promising line of attack by questioning whether the English rules are really designed to further public policy. Hamson emphasises the trend of decisions such as *Bowmakers'* case to assist indirectly in the enforcement of illegal agreements. It is to be hoped that the Supreme Court of India will pay due consideration to this warning when it ultimately has to decide whether to adopt the case. Grodecki's main plea is for a revolutionary change in the law, whereby the court is invested with a discretion in every case to order restitution if it thinks fit. This is an imaginative suggestion, but scarcely practical: it can surely not be maintained that the present state of the law provides so little discouragement to parties to illegal bargains that the time of a busy legislature must be devoted to its reform. His pleas for modification within the existing framework are not so cogent. It is submitted that he goes to the other extreme, and is too prone to favour the plaintiff, to whom he would give a remedy where the illegal object is frustrated by the other party. As has already been submitted, the illegal object is more likely to remain unfulfilled under the existing law which encourages either party to resile, the first to do so being the gainer thereby.[17] Grodecki is on firmer ground when he pleads that the

[15] *Op cit.*, 464 (*k*): *Smith's Advertising Agency* v. *Leeds Laboratory Co.* (1910) 26 T.L.R. 64, 335; *Pessers* v. *Catt* (1913) 29 T.L.R. 381; *Re Arthur Average Association* (1876) 34 L.T. 942.

[16] See *Evans* v. *Bartlam* [1937] A.C., at p. 479, *per* Lord Atkin.

[17] *Supra*, n. 54.

agreement should be considered to be executory until it has been fully executed, and a suggestion has already been made in this behalf.[18] Grodecki tends to exaggerate the artificiality of the maxim about *par delictum*, as has been submitted above[19]: its artificiality is marked only in one type of case.

The objects of this article have been limited, but, it is hoped, not insignificant. It is not an appeal for far-reaching reform to a legislature preoccupied with other matters, but an attempt to record and clarify the work of the judges in this sphere, an analysis which may be of interest to Indian lawyers when they are deciding how far to follow English precedents,[20] and may satisfy some English lawyers that there is no cause for undue disquiet.

[18] *Supra*, n. 43.
[19] *Supra*, n. 86.
[20] Kaikaus J. of the Lahore High Court (Pakistan) has stated that the courts need not apply the maxims here considered if in a particular case their application would lead to injustice or to a situation that public policy does not approve of: *Allah Ditta* v. *Allah Wasaya* (1956) 2 P.L.D. 521, 527. This is an indication that views similar to those held by Grodecki may receive judicial approval.

THE FUTURE OF CERTIORARI

H. W. R. Wade

Complaints have often been made about the pitfalls of certiorari as a remedy in administrative law. The reports of recent years have been rich in decisions on its scope, and some of them have brought welcome clarification. But others have been bewildering, so much so that the courts themselves have now begun to encourage litigants to abandon certiorari in favour of the action for a declaration. It is a little paradoxical that in 1932, when certiorari was less vexed with uncertainties than now, the Committee on Ministers' Powers [1] proposed to abolish it, yet in 1957, when it had proved notably unequal to the needs of the times, the Franks Committee [2] discharged it without a stain on its character—and, indeed, recommended that it be given a wider operation, as has now been provided in the Tribunals and Inquiries Act, 1958.[3] The explanation lies not merely in the proclivity of the earlier Committee to embark upon difficult legal questions, which their successors wisely avoided, but in the different nature of the problems considered, some being of form and some of substance. What the Ministers' Powers Committee wanted to reform was the "archaic and in some ways cumbrous and inelastic" procedure of the ancient prerogative writs of certiorari, prohibition and mandamus, for which they wished to substitute a general right of appeal to the High Court on a point of law. The Franks Committee, on the other hand, did not address themselves to the defects in procedure—although they were pointed out in evidence [4]—and they said singularly little about the proposals of 1932; they were concerned rather to protect certiorari against the operation of "judge-proof" clauses in Acts of Parliament,[5] and to endorse the sound policy of the bench in

[1] Cmd. 4060 (1932), pp. 62, 99, 117.

[2] Cmnd. 218 (1957), para. 117, recommending that remedies by certiorari, prohibition and mandamus be not excluded by statute. The same para. says: "It is sometimes asserted that the procedure involved in seeking these remedies is unduly complex, but we think that this criticism is unfounded."

[3] s. 11. For this provision, see p. 133 of this issue. It is interesting that although the section protects certiorari and mandamus, it says nothing as to actions for declarations. This may give certiorari an advantage.

[4] See Appendix I to the Minutes of Evidence, pp. 8 (Mr. S. A. de Smith), 30 (Professor E. C. S. Wade). Mr. de Smith's memorandum is a valuable commentary on the present difficulties. Professor Wade's views are amplified in his article on the Franks Report, 73 L.Q.R. at p. 484.

[5] See p. 133 of this issue.

giving such clauses a narrow construction. That certiorari itself was in a healthy state was evidently assumed without question. It must in fairness be added that a general inquest into the failings of certiorari would have carried the Committee far beyond their terms of reference.

Now most of these failings are merely procedural. By calling them "merely" procedural I do not mean that they are not important, but rather that they are relatively easily rectifiable. It defies all logic that certiorari, by which a general attack on the legality of an administrative act is often launched, should be subject to a procedure which rules out any other form of relief, and which has no proper interlocutory process. Recent cases show how easily judicial opinion can divide on the question whether the applicant is entitled to certiorari or to a declaration, yet there is no way of seeking these remedies in the alternative. How is it justifiable that in certiorari, but not in an action for a declaration, there is the short time-limit of six months for making application, that there are not full facilities for proving facts and cross-examining witnesses, and that there is no way to obtain discovery of documents? Had the Ministers' Powers Report not fallen upon stony ground, these anomalies might already have been removed. As it is, the minor improvements which were made by statute in 1933 [6] and 1938 [7] did not touch these defects, which are a legacy from the ancient procedure for moving the King's Bench for a prerogative writ.

But if these are blots, it should at least be easy to remove them. The procedure for seeking certiorari, prohibition and mandamus could be amended without any need to abolish those ancient remedies themselves. Like habeas corpus, they are monuments to the judges' genius for improvisation, for having originally been instruments of royal power they have been converted into bulwarks of the rights of the subject. They may well still have a great part to play in the control of administrative jurisdiction. Their value in no way depends upon the procedure for obtaining them; it lies wholly in their pith and substance. In the case of certiorari and prohibition, the question is how far the courts will assume jurisdiction, and what general principles they are prepared to enforce as fundamentally necessary to the exercise of all discretionary power, whether judicial or administrative. If the courts spoke with

[6] Administration of Justice (Miscellaneous Provisions) Act, 1933, s. 5, requiring rules of court to be made for the abolition of the procedure by order nisi and for the introduction of the present method of application.

[7] Administration of Justice (Miscellaneous Provisions) Act, 1938, s. 7, substituting orders of the High Court for the former writs of mandamus, prohibition and certiorari.

a clear and consistent voice, and in suitably general terms, a logical system of administrative justice could develop. But, unfortunately, there have been sharp variations of judicial policy; there is a constant tendency for cases to degenerate into argument over what is a "judicial" function; and there is always the temptation to make a microscopic examination of the words of a particular statute in the hope of extracting some nuance of parliamentary intention from words which Parliament, so far as it intended anything, intended to be colourless. These are the symptoms of weakness of principle.

As if recognising that the law of certiorari has been brought to the verge of breakdown, the courts are now encouraging litigants to abandon that remedy and sue (by a different procedure) for declarations of right. A shift of this kind from bad remedies to better ones is thoroughly in keeping with our legal history; it is, indeed, one of the classic devices for judicial improvement of the law. No mode of judicial legislation is more discreet than manipulation of the law of procedure. A closely parallel reform has been achieved in the courts of the U.S.A. since 1913,[8] and it is interesting to see its counterpart now on foot in this country. It seems worth asking what new substantive law is likely to be secreted in its interstices. This is really a matter of great importance, for the question is whether the courts should cut themselves free from the entanglement which has been made of certiorari and find a fresh field where they can make a new start.

The common use of certiorari, in the branch of the law with which we are here concerned, is to challenge the exercise of an administrative power on the grounds that it is in some way irregular in law. This opens the whole subject of judicial review, which has, and will always be bound to have, many difficult branches. For example, it will often be difficult to tell whether the Minister or tribunal complained against has erred (if it has erred at all) in a way which a court of law can control, *i.e.*, whether there is in law some excess or abuse of power. To confer discretion is to confer the power to make mistakes, and within its proper jurisdiction an administrative tribunal is a law unto itself.[9] Again, it will often be difficult to say whether a tribunal has power to determine facts on which its own jurisdiction depends, such as

[8] See Davis, *Administrative Law* (1951), pp. 730, 738. After *Degge* v. *Hitchcock* (1913) 229 U.S. 162, certiorari as a method of judicial review was ousted by the injunction, and after the Federal Declaratory Judgments Act, 1934 (revised, 1938) declarations also became available. But in many States certiorari still reigns, with its familiar difficulties: Davis, p. 779.

[9] Of the many decisions, *Associated Provincial Picture Houses, Ltd.* v. *Wednesbury Corporation* [1948] 1 K.B. 223 is perhaps the leading modern case.

whether a letting is a furnished letting and so subject to reference to a rent tribunal.[10] These are among the eternal problems of any system of administrative law, and there will never be a shortage of them. But, for the very reason that they will always be with us, they are beyond our immediate sphere of interest. No amendment of mere procedure is ever likely to solve them. My aim for the moment is to ask what it is that *can* be done by such means. This is tantamount to asking how far the present shortcomings of certiorari are fortuitous. For it is only the fortuitous shortcomings that procedural reform will be able to cure.

First, since most fortuitous of all, comes the group of shortcomings already mentioned. These were inherited from the ancient character of certiorari as a prerogative writ, which a subject could not obtain as of course, but only by specially moving the Court of King's Bench. It is for this reason, pointless though it is today, that certiorari must still be sought by a procedure which cannot be married to a claim to any other relief, and subject to additional handicaps such as the six-months' time-limit and the impossibility of obtaining discovery of documents. These last two obstacles were brought into prominence in 1953 by the case of *Barnard* v. *National Dock Labour Board*.[11] The plaintiff in that case was a dock worker who had been suspended from work by the local port manager, whereas the only body with power to suspend him under the statutory scheme for dock workers was the local Dock Labour Board. When he ultimately brought his action for a declaration that his suspension was illegal, the time-limit for applying for certiorari had already expired, and without discovery of documents he would never have discovered the vital fact upon which his case was finally won, that he had been suspended by the wrong person. Counsel for the Dock Labour Board naturally pressed the court with the argument that the plaintiff's remedy was certiorari or nothing, and that the rules governing certiorari ought not to be circumvented. Singleton L.J. said[12]: "There is great force in this submission, and there is a body of authority to support it. It cannot be right to say that whenever a tribunal such as the local board or the appeal tribunal makes a mistake the court can grant a declaration such as is asked for in the present case; that would lead to endless confusion." But he added "The courts have, however, power to grant a declaration or an injunction in certain cases to prevent an injustice," and it was for this very good but quite

[10] *R.* v. *Fulham, Hammersmith and Kensington Rent Tribunal, ex p. Zerek* [1951] 2 K.B. 1.
[11] [1953] 2 Q.B. 18.
[12] *Ibid.* at p. 35.

indefinite reason that the plaintiff succeeded. The court thus candidly recognises that the procedure for certiorari is such as to cause injustice. The time-limit of six months seems particularly unjustifiable, even though the court has power to extend it. By the Law Reform (Limitation of Actions, etc.) Act, 1954, Parliament repealed the Public Authorities Protection Act, 1893, because the six months' period of limitation under that Act had proved a source of hardship. But how shall this profit plaintiffs if one of the principal remedies for redress against public authorities remains subject to a six-months' time-limit under rules of court? [13]

The new judicial policy is evidently to grant a declaration in any case where the vagaries of certiorari would lead to injustice. The motive behind this development is excellent. But is the remedy the best one? So far as these matters of mere procedure go, they could all be put to rights by alteration of the rules of court. Probably no statute is required: the Rule Committee have the remedy in their own hands.[14] It will certainly seem strange if the present rules remain unchanged yet the courts encourage litigants to evade them by seeking declarations. There is, however, a larger question. Certiorari is a historic remedy, widely used throughout the English-speaking world, and in the very numerous cases upon it many important points have been elucidated. The defects which are so evident at the moment should not obscure the valuable work which judges both past and present have done.[15] If this body of law is to be put on the shelf, and declarations are to be sought instead, it will be a movement from the rule of law to the rule of discretion. For the only known rule about declarations is that they lie wholly in the discretion of the court. In *Barnard's* case Singleton L.J. said [16]: "It is a matter for the discretion of the court, and that discretion should be exercised sparingly." Denning L.J. agreed as to the existence of the discretion, but for his part he proposed a far from sparing use of it. The passage in his judgment is important, partly because of the implied invitation to litigants to abandon certiorari, and also in a wider context because it illustrates a spirit which is now abroad, that the courts of law should assume wide discretionary power. Denning L.J. said [17]: "I know

[13] R.S.C., Ord. 59, r. 4 (2); the court has jurisdiction to extend the time under Ord. 64, r. 7.

[14] The Rule Committee's constitution and powers are laid down in the Supreme Court of Judicature (Consolidation) Act, 1925, s. 99. But the statutory provisions of 1933 and 1938 (notes 6 and 7, above) may indicate that the Committee did not feel that its powers extended to radical reform of procedure. Should that be so in this case also, an Act of Parliament would be necessary.

[15] *Cf.* the views expressed by Mr. de Smith in the final paragraph of his memorandum referred to in note 4, above.

[16] [1953] 2 Q.B. at p. 38.

[17] *Ibid.* at p. 41.

of no limit to the power of the court to grant a declaration except such limit as it may in its discretion impose upon itself; and the court should not, I think, tie its hands in this matter of statutory tribunals. It is axiomatic that when a statutory tribunal sits to administer justice, it must act in accordance with the law. Parliament clearly so intended. If the tribunal does not observe the law, what is to be done? The remedy by certiorari is hedged about with limitations and may not be available. Why then should not the court intervene by declaration and injunction? If it cannot so intervene, it would mean that the tribunal could disregard the law, which is a thing no one can do in this country."

The powerful appeal of this passage ought not to obscure the fact that there is no need for certiorari to be hedged about with limitations of obsolete procedure. What was recommended by the Ministers' Powers Committee in 1932 could in substance be carried out by rules of court which would assimilate the procedure for certiorari with the procedure in ordinary actions. In one sense this would abolish certiorari, for it would be stripped of its peculiarities; but in another sense it would not, for it would preserve continuity with the substantive law of the past. General considerations of legal policy ought to favour preserving the accumulated law as to judicial control, difficult though some of it is, rather than launching out onto a new ocean of unbounded judicial discretion.

But now there are signs that plaintiffs are to be encouraged to sue for declarations for more than merely procedural reasons. It has been suggested from the bench that a declaration may be an avenue for evading the rule that certiorari will lie only to control a "judicial" function. At the time when Lord Atkin summed up the existing law in his famous statement in the *Electricity Commissioners* case,[18] that certiorari lay "whenever any body of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially, act in excess of their legal authority," a wide and liberal meaning was given to the word "judicially," as the Court of Appeal's judgments show. This was the tenor of the law until about ten years ago [19]; and before that time, of all the manifold matters on which a claim to certiorari could come to grief, the one least likely to be serious was the question whether an administrative power had to be exercised "judicially." But then, for some unfathomable reason, a cloud

[18] [1924] 1 K.B. 171 at p. 205.

[19] The first signs of serious confusion of terminology appeared in *Franklin* v. *Minister of Town and Country Planning* [1948] A.C. 87, discussed in (1949) 10 C.L.J. at pp. 234 *et seq.*

of amnesia appeared to descend, notably in two cases concerning the cancellation of licences, where very distinguished judges refused certiorari in surprising circumstances. There was nothing technical or procedural at stake. The question in both cases was whether a statutory power to deprive a man of his livelihood could be exercised without giving him a hearing. It was twice held that this could be done. There can be no doubt that this was a new departure, in conflict with the spirit of a long line of authorities, and that it would have startled the judges of preceding generations who set such store by the principle *audi alteram partem*.[20] The first case was *Nakkuda Ali* v. *Jayaratne*,[21] an appeal from Ceylon before the Judicial Committee of the Privy Council, in which Lord Radcliffe delivered the opinion. It was there held that a textile merchant's trading licence could be cancelled by the local controller of textiles without giving him a hearing. A hearing had, in fact, very properly been given, and the Judicial Committee went out of their way to hold that this was unnecessary in law. The second case was *R.* v. *Metropolitan Police Commissioner, ex p. Parker*,[22] a decision of a Divisional Court in which judgments were given by Lord Goddard C.J. and by Parker and Donovan JJ. In that case a London cab-driver's licence was revoked by the Metropolitan Police Commissioner, and it was likewise held that he had no right to be heard before he was penalised. These are the cases that have thrown the law into confusion, for it is no longer possible to say, as earlier judges steadfastly said, that *audi alteram partem* is a general principle.[23] What has to be said now is that it is a principle the scope of which has been in some way cut down by narrowing the category of "judicial" functions; but that, as the authorities now stand, it is almost impossible to be sure what a "judicial" function is. This shakes the whole foundation of certiorari. The object of parading the cases again is not to repeat

[20] "But this reasoning seems to be at variance with legal history. Far from there being any presumption that officials who grant licences do not act as tribunals, the presumption has been all the other way, at least where licensing is a means of protecting the public and not merely of raising revenue. The books are full of references to 'licensing tribunals'; and the reports cover scores of cases in which such tribunals' decisions have been questioned on certiorari and otherwise." Mr. D. M. Gordon, Q.C., commenting on the *Parker* case (note 22, below), 70 L.Q.R. 205–206.

[21] [1951] A.C. 66. The contrast between this decision and *Smith* v. *R.* (1878) 3 App.Cas. 624 is especially striking: see 67 L.Q.R. at p. 107.

[22] [1953] 1 W.L.R. 1150; [1953] 2 All E.R. 717.

[23] "I apprehend that a tribunal which is by law invested with power to affect the property of one of Her Majesty's subjects, is bound to give such subject an opportunity of being heard before it proceeds: and that that rule is of universal application, and founded upon the plainest principles of justice." Willes J. in *Cooper* v. *Wandsworth Board of Works* (1863) 14 C.B.(N.S.) 180 at p. 190.

criticism already made,[24] tempting though that is. It is rather to discuss the repercussions which these cases seem destined to have upon the general system of remedies. Certain suggestions which learned judges have recently made have given a fresh point to the subject.

This point can be put into its setting by a brief sketch of well-known historical facts. In the eighteenth century most administrative powers were in the hands of justices of the peace; and whatever the justices had to do was controllable by the prerogative writs of certiorari, prohibition and mandamus. No distinction was made between judicial and administrative powers. "Whatever the justice has had to do has soon become the exercise of a jurisdiction; whether he was refusing a licence or sentencing a thief, this was an exercise of jurisdiction, an application of the law to a particular case."[25] Then, to quote Bankes L.J.[26]: "As statutory bodies were brought into existence exercising legal jurisdiction, so the issue of the writ came to be extended to such bodies. There are numerous instances of this in the books, commencing in quite early times. In the case of *R.* v. *Inhabitants of Glamorganshire*[27] the court expressed the general opinion that it would examine the proceedings of all jurisdictions erected by Act of Parliament. . . ." When in the nineteenth century there was a general sorting out of functions and administrative powers were mostly transferred to new authorities, the judges were not in the least daunted and continued to describe administrative functions as judicial, granting certiorari to review them. There were periods of confusion, it is true, for the traditional language seemed to contradict the logical analysis of powers[28]; and the term "quasi-judicial" was a by-product of this difficulty.[29] But the substance of the law was secure. A series of decisions[30] laid down that the acts of a local authority such as a Board of Health or Board of Works could be reviewed in much the same way as the acts of justices. In short,

[24] The *Nakkuda Ali* case is criticised by myself in (1951) 67 L.Q.R. 103; the *Parker* case by Mr. D. M. Gordon, Q.C., in (1954) 70 L.Q.R. 203. Mr. de Smith adopts a similarly critical viewpoint in 68 Harv.L.R. 569 at pp. 594–595, and draws attention to the healthier trend of authority in other countries of the Commonwealth. See also Dr. R. B. Cooke in [1954] C.L.J. 14.

[25] Maitland, *The Shallows and Silences of Real Life*, *Collected Papers*, i, at p. 478.

[26] In the *Electricity Commissioners Case* [1924] 1 K.B. at p. 193.

[27] (1700) 1 Ld.Raym. 580.

[28] The licensing powers of justices were only finally determined to be judicial in *R.* v. *Woodhouse* [1906] 2 K.B. 501 (reversed on other grounds, [1907] A.C. 420).

[29] See "'Quasi-judicial' and its Background" (1949) 10 C.L.J. 216.

[30] The cases run from *Cooper* v. *Wandsworth Board of Works* (note 23, above) to *Urban Housing Co.* v. *Oxford City Council* [1940] Ch. 70. They are listed by Mr. de Smith in 68 Harv.L.R. at p. 575.

all important discretionary powers were denominated "judicial." Three brief quotations will serve as samples. In a case of 1890 Wills J. said [31]: "In condemning a man to have his house pulled down, a judicial act is as much implied as in fining him £5." In 1906 Fletcher Moulton L.J. said [32]: "The true view of the limitation would seem to be that the term 'judicial act' is used in contrast with purely ministerial acts . . . there must be the exercise of some right or duty to decide in order to provide scope for a writ of certiorari at common law." Five years later Lord Loreburn [33] said that the Board of Education "must act in good faith and listen fairly to both sides, for that is a duty lying upon anyone who decides anything." In other words, all drastic discretionary power was "judicial" and so subject to review for excess or abuse. The exercise of all powers must be "not arbitrary, vague and fanciful, but legal and regular." [34] The two universal principles are rightly called natural justice [35]—that a man should be heard before he is penalised, and that, except where Parliament has made it inevitable, a man should not be judge in his own cause. The judges who implanted these rules were laying the foundations of administrative law, just at the time when Dicey, who ignored this subject, was saying that there was no such thing. Had teachers and authors only expounded it, the law of certiorari might possibly be less of a maze than it is today.

That liberty, livelihood and property are not to be taken away except after fair consideration of objections is just as necessary a rule of good administration as it is of legal procedure. There are, of course, difficulties as to where to draw the line, whether the hearing need be oral, and so forth.[36] There are also likely to be a few cases where a hearing is inappropriate. But the golden rule which the judges of the past always insisted upon was that in general the exercise of discretionary power is lawful only after hearing the intended sufferer, and that in any statute Parliament is presumed to intend powers to be exercised only in this lawful way, unless the contrary is provided.[37] The contrast between this classic attitude and that of the recent cases has been pointed out by Mr. D. M.

[31] In *Hopkins* v. *Smethwick Local Board of Health* (1890) 24 Q.B.D. 712 at p. 714.
[32] In *R.* v. *Woodhouse* (note 28, above) at p. 535, quoted with approval by Bankes L.J. in the *Electricity Commissioners* case (note 18, above) at p. 195.
[33] In *Board of Education* v. *Rice* [1911] A.C. 179 at p. 182.
[34] Lord Halsbury L.C. in *Sharp* v. *Wakefield* [1891] A.C. 173 at p. 179.
[35] See note 23, above.
[36] *Local Government Board* v. *Arlidge* [1915] A.C. 120.
[37] ". . . although there are no positive words in a statute requiring that the party shall be heard, yet the justice of the common law will supply the omission of the legislature": Byles J. in *Cooper* v. *Wandsworth Board of Works* (note 23, above).

Gordon, Q.C.[38]: "In both the *Parker* case and *Nakkuda Ali* v. *Jayaratne* much was made of the absence of any mention in the governing enactment of any hearing by the official, as excluding the need for one; and from this it was inferred that he was never intended to act as a tribunal. But the books teem with cases which hold that the absence of any express requirements of a hearing proves nothing at all if in any way it appears that the official is made a tribunal."[39] What is so remarkable about the two cases mentioned is not only the refusal of the traditional and innocuous right to a fair hearing, but also the assumption that they could be decided on generalities unsupported by authority, as if the principles on which the right to a hearing depends had never before been argued in an English court of law. It is interesting to see how both cases, though apparently decided originally in complete detachment, now loom large and ominous in discussions of the scope of review by certiorari, because they will not fit into the pattern. They do indeed deserve attention. For what is to be thought of our law if it insists on a hearing for a member expelled from his club,[40] but not for a trader or a taxi-driver expelled from his living?

In his recent Hamlyn lectures[41] Lord MacDermott speaks of "an important but, as I think, a most unfortunate limitation . . . the scope of certiorari is confined to acts of a judicial nature and does not embrace the purely administrative decision." He then discusses the law almost wholly in terms of these same two cases, as if they were typical. That perhaps explains why he thinks that the state of the law is unfortunate, for unlike the judges who decided those cases he is favourable to the doctrine of *audi alteram partem*. He inclines, however, to lay the blame at the door of Parliament[42]: "I think the real lesson of the decisions is to emphasise how important it is that Parliament should speak with the utmost clarity in arming the executive with any drastic power. If the awful choice had to be made, it would be far better to go to the length of resorting to footnotes to explain the text. . . ." Then as to judicial control in general Lord MacDermott says[43]: ". . . the remedy here lies, at any rate in the first instance, with Parliament . . . it should be feasible, in many instances, to make the power in question conditional upon the observance of the *audi*

[38] (1954) 70 L.Q.R. at p. 209.
[39] For the wide meaning of "tribunal" in this context, see note 20, above.
[40] *Fisher* v. *Keane* (1878) 11 Ch.D. 353; *Labouchere* v. *Earl of Wharncliffe* (1879) 13 Ch.D. 346; *Lee* v. *The Showmen's Guild of Great Britain* [1952] 2 Q.B. 329 at p. 343.
[41] *Protection from Power under English Law* (1957) 88.
[42] *Ibid.* at p. 92.
[43] *Ibid.* at p. 93.

alteram partem principle." That has of course often been done, as in the numerous statutes which provide for public inquiries. But one has only to look at the long line of earlier cases to see that the judges had already solved this problem for themselves, without invoking the aid of Parliament, by making the presumption stated in the above quotation from Mr. Gordon's article. What was wrong with that solution? Should it really be necessary for Parliament to provide for the precise mode of exercise of every power, as if there were no principles of administrative law? If the case-law becomes an inextricable tangle there may, indeed, arise a cry for a general statute, a kind of administrative Bill of Rights; but this would be a confession of failure on the part of the courts, for they need only continue their old work of developing the rules of natural justice in a broad and consistent way.

With Lord MacDermott's wish for legislative succour it is interesting to contrast the opinion of another eminent judge and Hamlyn lecturer, Lord Denning. At the close of his final lecture Lord Denning said[44]: "Our procedure for securing our personal freedom is efficient, but our procedure for preventing the abuse of power is not. Just as the pick and shovel is no longer suitable for the winning of coal, so also the procedure of mandamus, certiorari and actions on the case are not suitable for the winning of freedom in the new age. They must be replaced by new and up-to-date machinery, by declarations, injunctions and actions for negligence; and, in judicial matters, by compulsory powers to order a case stated. This is not a task for Parliament. . . . The courts must do this. Of all the great tasks that lie ahead, this is the greatest." Lord MacDermott and Lord Denning are thus agreed that the law of certiorari is now in an unsatisfactory state, but they prescribe two quite different remedies. The one remedy that is not suggested is that the courts should return to their fine tradition of enforcing the rules of natural justice as general principles; certiorari could then continue to play its historic part, subject to the necessary procedural reform.

In a recent judgment Lord Denning has returned to his theme. The remedy by declaration, in addition to its procedural advantages, is now seen as the instrument which will free the law from Lord MacDermott's "most unfortunate limitation": the restriction of the remedy to "judicial" functions. Like Lord MacDermott, Lord Denning states the law as if the principal authorities were the cases of *Nakkuda Ali* and *Parker*, without regard to any of the older authorities which were not considered in those two

[44] *Freedom Under the Law* (1949) 126.

cases. This was in the case of *Pyx Granite Co., Ltd.* v. *Ministry of Housing and Local Government*,[45] an important decision of the Court of Appeal (where Lord Denning was temporarily sitting) in which a variety of judicial opinions were expressed on some difficult matters relating to a conditional grant of planning permission for quarrying in the Malvern Hills. One question was whether, despite a statutory provision that the Minister's decision on an application "shall be final," the court had jurisdiction to determine whether certain conditions attached by the Minister to the permission were valid in law. The time limit for certiorari had long expired, and the plaintiff company asked for declarations as to its rights. The Court of Appeal by a majority held that it had jurisdiction to review the matter and to make declarations, but on the issue of substance they upheld the action of the Minister. In Lord Denning's judgment there is a passage which may well prove to be of an importance equal to Lord Atkin's classic statement in the *Electricity Commissioners* case, and which is doubly interesting because two markedly different versions of it have been reported. In the following quotation I have ventured to italicise the words which appear in the *Law Reports*, but not in the *Weekly Law Reports* or the *All England Reports*. Lord Denning said[46]: "He (*sc.* counsel) assumes / "*I think it is probable* } that certiorari would lie to quash, but { I am by no means sure about this. / *I can see an argument to the contrary.* } *It can be said that* certiorari is confined to judicial acts; and it can be argued that the Minister, when granting planning permission, is not acting judicially, but administratively, and that his decision is, therefore, not subject to certiorari. Mr. Squibb said that it is sufficiently near a judicial decision to be the subject of certiorari, and he referred us to *R.* v. *Hendon Urban District Council, ex p. Chorley*.[47] *He is probably right about this; but I would not like to be dogmatic about it,* { But / *because* } since that case there have been the decisions of the Privy Council in *Nakkuda Ali* v. *M. F. de S. Jayaratne* and of the Divisional Court in *R.* v. *Metropolitan Police Commissioner, ex p. Parker*, which *may be said to* have restricted the scope of this remedy, *though I hope not*.

"It is one of the defects of certiorari that it so often involves an inquiry into the distinction between judicial acts and administrative acts which no one has been able satisfactorily to define.

[45] [1958] 1 Q.B. 554, noted in this issue, above, p. 135.
[46] [1958] 1 Q.B. at p. 571; [1958] 2 W.L.R. at p. 383; [1958] 1 All E.R. at p. 632.
[47] [1933] 2 K.B. 696.

No such difficulty arises with the remedy by declaration, which is wide enough to meet this deficiency, as this court had occasion to point out in *R.* v. *Staff Sub-Committee of London County Council's Education Committee, ex p. Schonfeld (Practice Note)*,[48] which was not reported on this point."

The difference of emphasis in the different reports will not be missed. As first reported, in two independent reports, Lord Denning appeared to have decided that the *Nakkuda Ali* and *Parker* cases had effectively hamstrung certiorari by making it impossible to rely on older authorities as to what was for this purpose a judicial function. But as later reported in the *Law Reports* Lord Denning expresses the hope that this is not so, and, indeed, gives it as his own opinion that the older law can probably survive the two decisions which have cut across it so sharply. Let us hope that second reports are best. Nevertheless, on any interpretation, Lord Denning's judgment is in full accord with the policy put forward in his Hamlyn lectures, that the difficulties of certiorari can be evaded by actions for declarations, which can only mean that in this branch of the law certiorari may soon be as dead as the real actions. The great interest of this latest judgment is that it goes beyond mere obstacles of procedure, and opens a new avenue through the heart of the jungle of the substantive law. But it is an avenue of palm trees, for no-one knows when the court in its discretion will grant declarations and when it will not.

If absolute precision is required, it is, of course, true that no one has been able satisfactorily to define the exact limits of what for purposes of certiorari are considered to be judicial functions. But the law is full of such problems of demarcation, and the fact that a line is difficult to draw does not mean that it ought not to be drawn. No one can satisfactorily define, in the last analysis, the difference between capital and income, and the income tax legislation makes no attempt to define "income." But that is no reason why the tax law cannot be administered. The crucial question is not whether a distinction is difficult to apply but whether it is of fundamental importance. Lord Denning is clearly of the opinion that the long-established rule limiting the scope of certiorari is unnecessary, and Lord MacDermott calls it "most unfortunate." But, if certiorari were replaced by a discretionary jurisdiction to grant declarations, the judges would be faced with exactly the same problem in another form. There must always be some limit to judicial control. The question simply is where that limit lies.

[48] [1956] 1 W.L.R. 430 (Denning, Morris and Romer L.JJ.). The report deals only with the right of an applicant for certiorari to appear in person.

Certiorari, after all, is itself a discretionary remedy,[49] and apart from its peculiar procedure it is little different from a declaratory judgment. The real need is not for more discretion but for more consistent decisions showing what forms of abuse of power the courts will regard as contrary to law. Much valuable work was done in this field by earlier judges who developed the doctrines of judicial control on a broad footing. There appears now to be a danger that this policy will be abandoned because of two incongruous decisions. But why should bad cases drive out good? *Nakkuda Ali's* case, being a decision of the Privy Council, is not binding elsewhere, and might well go the way of the *Strathcona* case[50] in the due course of time. *Parker's* case is a decision of the Divisional Court which was plainly reached without reference to precedent, not one case on *audi alteram partem* being mentioned. The tendency of the moment seems to be to magnify the authority of these decisions, so as to give certiorari a bad name and hang it. But what will then happen? The courts may assume a free discretion to grant declarations, but that will not free them from the need to define their jurisdiction, and to face questions of substance. But if learned judges are now ready to hold that powers to deprive men of their livelihoods may lawfully be exercised without hearings, a new régime of free discretion is not altogether a comforting prospect. Nor is there better promise of more uniform case law if judges, as is only to be expected, hold different opinions, some believing that the law must be changed by Parliament and others believing that they must change it themselves. The great merit of the law as to judicial control and natural justice, as it stood until a few years ago, was that there was a consistent judicial policy based on long experience and sound principle. The right policy now, it is submitted, is not to forsake the old law but to return to it.

The House of Lords has upheld a claim to a declaration in *Vine* v. *National Dock Labour Board*,[51] and although the declaration was not sought in order to escape the obstacles of certiorari, the case throws some light on the jurisdiction to grant that remedy and on the nature of "judicial" functions. A dock worker had been dismissed by a disciplinary committee appointed by a local dock labour board, but invalidly—for it was held that under the statutory scheme governing dock workers the power of dismissal was vested in the local board and could not be delegated to a committee. Thus the docker's dismissal was irregular for much

[49] *Ex p. Fry* [1954] 1 W.L.R. 730.
[50] See p. 169 of this issue, above.
[51] [1957] A.C. 488.

the same sort of reason as in *Barnard* v. *National Dock Labour Board*.[52] The court had to decide whether he was sufficiently compensated by an award of damages for wrongful dismissal, or whether he was also entitled to a declaration that he had never been validly dismissed. In other words, the question was whether he worked merely under a contract of service, which could be determined even though in breach of contract and for which an award of damages would be the only remedy; or whether he had in addition the status of a registered dock worker under the statutory scheme, which could only be taken from him by lawful dismissal, and which the court would protect by declaring him to be still entitled to it. The House of Lords unanimously upheld the latter proposition, and granted a declaration in their discretion. Their lordships stressed the fact that a docker could work only under the statutory scheme, and that his whole livelihood depended on his status as a registered worker. Furthermore, the majority of the House (Lord Kilmuir L.C., Lord Morton and Lord Cohen) said expressly that they considered the power to dismiss to be a judicial function in the sense found in the cases on certiorari; Lords Keith and Somervell left this point open. But if the power to deprive a docker of his employment is a judicial function, surely the power to deprive a taxi-driver of his licence is judicial also. Does not the majority view of the House of Lords, which is entirely in accordance with all the older cases, really deprive *Parker's* case of its authority? Nothing was said in the House of Lords of Lord Goddard's novel and severe proposition that disciplinary powers should be outside the scope of certiorari [53]—a proposition which the Court of Appeal in the later case of *Ex p. Fry* [54] were careful to avoid endorsing. Nothing could be more disciplinary than the dismissal of Mr. Vine by the disciplinary committee, yet the House of Lords found no difficulty in holding the proceedings judicial. A disciplinary power is a power to inflict a punishment, and if there is any one field in which the principle *audi alteram partem* should be sacrosanct, that is it.

Lord Somervell's opinion on this part of the case shows that he, like Lord Denning, was more impressed by the difficulties of definition. He expressly refrained from deciding whether the power of dismissal was judicial or not, and said that the expression "quasi-judicial functions" was "sadly lacking in precision," [55] adopting the well-known words of Hamilton L.J. (as he then was)

[52] Above, note 11.
[53] [1953] 1 W.L.R. at p. 1155.
[54] Above, note 49. On this point, see [1954] C.L.J. at p. 155.
[55] [1957] A.C. at p. 511.

in *Arlidge's* case.[56] He also stressed the importance of scrutinising every statute for clues to Parliament's intention. But while careful attention must always be given to the words of a statute, the truth is that in the majority of such cases Parliament has no clear intention, and leaves it to the courts to develop general principles of interpretation. The assumption that the court need look no further than the particular statute, and that former cases on the same point but decided under other statutes may be disregarded, is what now threatens to make certiorari a wilderness of single instances.

The argument of this article, briefly summarised, is that the defects of certiorari are of two kinds, procedural and substantial. The former can and should be put right by new rules of procedure. The substantial defect, the difficulty of fixing the scope of the remedy, will always exist, under whatever forms. On neither ground, therefore, is it necessary to abandon certiorari in favour of actions for declarations, as the courts are now inviting litigants to do. The objection to declarations is that they are wholly discretionary, and that they may lead to a break with valuable traditions developed under certiorari, particularly the rules of natural justice. If a fresh start is to be made now, it is doubtful if the climate of judicial opinion will prove more favourable to a comprehensive system of administrative justice. But an abundance of good material for such a system can be found in our law over the past century and more. Reform is needed, but the new corn will best come from the old fields.

[56] [1914] 1 K.B. 160 at p. 199.

BOOK REVIEWS

Aspects of Justice. By Sir Carleton Kemp Allen, M.C., Q.C., D.C.L., Hon.D.C.L. (Glasgow), F.B.A., F.R.S.L., J.P., of Lincoln's Inn; sometime Professor of Jurisprudence in the University of Oxford; Fellow of University College, Oxford. [London: Stevens & Sons, Ltd. 1958. ix, 306 and (index) 4 pp. 25s. net.]

A glance at the Contents page of this book shows that it contains a curious variety of subjects. Half the book is occupied by "Aspects of Justice," considered under the headings of "The Grammar of Justice," "Justice and Mercy," "Justice and Justice-According-to-Law," "Justice and Expediency" and "Justice and Liberty." The rest deals with "Cruelty," "The Conscience of Counsel" and "The Literature of the Law." Nearly all the sections are reprinted essays or prints of lectures.

The author says this of his handling of the subject of Justice: "The subject being so vast and the literature so enormous, I cannot hope to offer anything which has not been said before a hundred times better than I can say it. . . . Presumptuous though the attempt may be, I will only try to disengage those characteristics of Justice, which in the opinion of the learned (so far as I have studied them) seem to be essential to its conception and operation —the irreducible minimum, so to speak, of its qualities." If I may be allowed to say so, the author carries out this task most elegantly. But when the speculator overcomes the lawyer one feels a little regretful. To suggest, as the author does at one place, that there may be some rudiments of justice even among societies of animals surely does no useful service to the science of law.

The section of the book devoted to the law of cruelty is divided into three parts, "Cruelty to Children," "Cruelty to Animals" and "Matrimonial Cruelty." Each contains a useful summary of the history of the law, and the section on matrimonial cruelty discusses very interestingly the changes in the attitude of the courts towards this thorny subject. Sir Carleton Allen's experience as a magistrate has, one feels, some bearing on the close attention he has given to this branch of our law.

The next section of the book is a reprint of an essay in the *Law Quarterly Review* where the author set out material which he had gathered from a number of sources about the trial at Sydney, Australia, of one George Dean, and matters which arose out of it. I cannot resist setting out briefly the salient facts.

In 1895, Dean, a Sydney Harbour ferry captain, was found

guilty of attempting to murder his wife by giving her arsenic and strychnine. At that time this was a capital offence in Australia. There was no doubt that considerable quantities of these poisons had been introduced into her body. The case for the prosecution, apart from the unchallenged medical evidence, rested on the evidence of the wife and her mother, Mrs. Seymour. The issue at the trial was clear. Either Dean had tried to poison his wife, or she, on her own initiative or in conspiracy with her mother, had taken large quantities of the poisons in order that a false charge might be made out against Dean.

He was defended by a solicitor named Meagher. After the trial there was a public agitation. Dean had been something of a popular hero, and many people refused to accept that a man such as they believed Dean to be could have attempted to poison his wife. They preferred to believe that he was the victim of a conspiracy engineered by Mrs. Seymour, a woman with a shady past.

As a result of the agitation, in which Meagher took a prominent part, a Royal Commission was appointed to reopen the whole case. It consisted of one lawyer and two doctors. The appointment of the two doctors was quite ridiculous: there was no contest on the medical side of the case. After a prolonged and unsatisfactory inquiry the lawyer was convinced of Dean's guilt but the doctors were not. Dean was granted a Royal Pardon.

Now comes the drama. During the latter part of the time when Meagher was agitating for a Royal Commission, he came to know, as a result of a trap he had laid in talk with Dean in the condemned cell, that Dean was guilty. It was, of course, then clear to Meagher that any endeavour to establish the "innocence" of Dean before a Royal Commission could only tend to make it appear that the two innocent women had been guilty of the most abominable wickedness.

Shortly after Dean's release from prison Meagher became a candidate for the Legislative Assembly. A politically hostile newspaper charged him with having bungled Dean's defence, and with having by his incompetence caused an innocent client to be convicted. Meagher consulted the then leader of the Australian Bar, Sir Julian Salomons, Q.C., as to whether the newspaper article was actionable. The consultation had far-reaching consequences. Sir Julian, who had led for the Crown before the Royal Commission, now learned from Meagher of Dean's guilt. This put the distinguished leader in a painful dilemma. To violate a professional secret was a dreadful thing to contemplate, but could he properly remain silent in view of the manifest injustice which had been done, to Meagher's knowledge, indeed with his active assistance, to the two women? For the rest of this most interesting story I must refer the reader to the essay.

The last section of the book is a print of a lecture on "The Literature of the Law," intended for laymen rather than for lawyers. Surely it is only a lawyer who can appreciate to the full a

phrase like this—"A statute is probably the most repellent form of written expression known to man. Nobody has ever read a statute except for duty, never for pleasure."

Having written thus far about this collection of very mixed ingredients I think I have found the answer to the question which arose in my mind when I first read the Contents page—Why this mixture? It is difficult to imagine that any one lawyer will be interested in all the sections. The first half of the book is not likely, I think, to interest many readers outside the universities. But I do not think that any lawyer can read this book from cover to cover without finding a great deal to interest and delight him. That, to me, is reason enough for the mixture at 25 shillings net.

DENIS GERRARD.

The Machinery of Local Government. By R. M. JACKSON, LL.D., Solicitor of the Supreme Court, Fellow of St. John's College, Cambridge; Reader in Public Law and Administration in the University of Cambridge. [London: Macmillan & Co., Ltd. 1958. xii, 353 and (index) 7 pp. 30s. net.]

DR. JACKSON'S book is in fourteen chapters, on the nature of local government, councils and councillors, powers, party politics, the committee system, the work of the council, by-laws, staff, finance, relations with the central government, areas, elections, and dishonesty and corruption; and a conclusion. It has a preface and an index, but no table of cases or statutes, and very few footnotes.

There are already too many books on the structure of local government—a subject which is compact, certain, and giving rise to problems on which there is enough material easily accessible, repetitive but not unmanageable in quantity. Hence its popularity. There are few books on the functions of local government, except statutory analyses which are unreadable. *The Machinery of Local Government* is about structure. And the proper measure of Dr. Jackson's achievement is that he has, in the face of probability, produced an account which is better than the others of its kind and worth doing. In general perspective, it is to be strongly recommended. In the higher standard of Dr. Jackson's own perspective it is not to be compared with his *Machinery of Justice*, but that (especially in its first edition) was one of the best half-dozen legal textbooks of this century.

This is not a legal textbook. It is not a book primarily for lawyers or law students. Therefore they should read it. It is written at an elementary level for those who want to know about local government and how it works. The style is discursive, even a little chatty, sometimes too loose. For example: "If we could organise all people all over the world in a sensible way we

presumably could avoid war and preparation for war and produce a social order that would be much better than the world as we know it" (p. 59). This either is too high a claim for social organisation or implies personal regimentation to the point of servitude. But it should not be left without explanation. Again: "If it is true, as I think, that party politics have contributed very little to local government, this does not mean that they should be treated as necessarily an evil thing. It seems to me to depend on whether there are differing party policies that are relevant to local government. If we are in the realm of things that really can be done by the local council and party principles indicate one thing rather than another, then there is a genuine issue to fight about, and party politics are right and proper" (p. 60). But party politics in local government (at least) are expressions of hopes and fears, of prejudices and preconceptions. They can never be isolated into principles; these are only the part of the iceberg above the water. And the submerged nine-tenths are always at work, though not always in conflict. Party politics cannot be horizontally divided, with "principles" as respectable and the remainder as best rejected. Dr. Jackson does not mention, in his chapter on Committees, the packing of important committees with members of the majority party, sometimes to the exclusion of members of other parties, and often without giving those others a proportional representation. Generally this chapter understates the difficulties of minority groups. But it should be said at once that his chapter on Party Politics is the best analysis that has been written.

Dr. Jackson's difficulty (which he knows very well) is that the practice of local government is so various, between different local authorities, that general descriptions are bound to be inaccurate (I doubt whether it was worth mentioning that chairmen of councils have no chains of office (p. 36), but I know one who has). The relatively uninstructed layman, at whom the book seems to be directed, cannot be led by the hand to the place where the waters may close over his head. But the chapter on By-laws does not bring out clearly the extent of departmental control, the defects of the Exchequer Equalisation Grant are not properly discussed (p. 195), and the passage on prerogative orders is oversimplified (pp. 228–31). The sentences on *Prescott* v. *Birmingham Corporation* (p. 225) emphasise the ground which found favour with the judge at first instance, not with the Court of Appeal, and there is no mention of the "trust" concept, though this does appear eleven pages later. The concept also is touched on in a footnote to p. 38 where it is wrongly said that in *Att.-Gen.* v. *Leicester Corporation* it was held that statutes no longer limit borough spending (the statement was *obiter*). In view of *Prescott*, is it correct to say: "There has been no case at all like *Roberts* v. *Hopwood* for many years and there seems no reason to believe that the activities of local authorities are in any danger of being restricted through the

judicial doctrine that they must use their powers reasonably" (p. 234)?

There are a few small points: the nature and effect of surcharging are differently (and, so, confusingly) stated on pp. 26 and 204; elementary education is not "now called primary" (p. 47); surely the reason why education committees do their main work in sub-committees is not that the press and public may be admitted to the full committee (p. 70, note) but because the committee is large and its functions very great so that delegation is inevitable and the real fighting is done in smaller groups where the restrictions of standing orders as applied to debates do not operate.

The book was published on February 6, 1958, and so could not take account of the Local Government Act, 1958. This has meant that the change from percentage to general grants is only mentioned in passing (p. 212). Also the Ministerial circulars resulting from the Report of the Franks Committee are not discussed.

The task which Dr. Jackson set himself was considerable. And he has succeeded where many have failed; for he has written an interesting book on local government which, at the same time, does not presume knowledge in the reader. I wish he could have made it tighter and so shorter. But it remains a considerable achievement.

J. A. G. Griffith.

Sociological Theory: A Book of Readings. Edited by Lewis A. Coser, Brandeis University, and Bernard Rosenberg, College of the City of New York. [New York and London: The Macmillan Company. 1957. xiii and 578 pp. 45s. 6d. net.]

One of the aims of the editors of this *Book of Readings* is to indicate how large an accumulation of empirically validated results, interlaced with theory, has actually grown up in sociology. Perhaps they have been more successful in showing that, though the features of a science of society can by now be perceived rather clearly, "much more difficult theoretical work—in constant interplay with research—is still required to transform into solid achievement what is as yet largely a promise" (p. 13). They are sceptical of the tendency to claim that *the* sociological theory is to emerge within a very short time from the development of a master scheme now in the process of elaboration (doubtless by Talcott Parsons?). Rather they agree with Robert K. Merton that "Sociological theory must advance on these interconnected planes: through special theories adequate to limited ranges of social data, and the evolution of a more general conceptual scheme adequate to consolidate groups of special theories." Hence, while the editors fully agree with the "Methodological Note" of Thomas and Znaniecki in their "Polish Peasant" about the fallacies that result from trying to understand

difficult situations without any guiding theoretical framework, they have not attempted to display integrated systems of theory or to illustrate the whole work of individual theorists. They have selected discussion of special propositions, or specific concepts, or examples of substantive theorising, so as to provide an historical introduction to those theoretical ideas which inform the work of contemporary sociology. Each of the fourteen main sections is introduced by a brief sketch of the origin and history of the concepts elaborated in the readings which follow. Illuminating as these are, they can hardly suffice to guarantee that students will feel, as the editors hope, that they are being presented with an integrated view of the development of the science of sociology rather than with a jumble of information. This work will doubtless prove most valuable to students, but it will not dispense with the need for a teacher, or at least a more systematic textbook.

After a brief Introduction and a helpful "Definition of the Field," seventy-four "readings" from fifty-three authors are arranged in three parts under the headings "General Concepts" (Culture, Interaction, Social Control, Power and Authority, Cohesion and Conflict), "Self-Other Concepts" (Definitions of the Situation, Role-taking and Reference Group), and "Structural Concepts" (Primary Groups, Status, Class, Bureaucracy, Anomie, Structure and Function, Sociology of Knowledge). There are six extracts from the works of Max Weber, four from Malinowski, three each from Marx and Durkheim. If, as the editors admit, an element of personal bias has crept in, this may perhaps be discerned in the five extracts from Merton. But they seem justified in hoping that they have kept their bias under control.

What is there here of special interest to the lawyer? "The Peace in the Feud," by Max Gluckman, is a tantalising extract from his "Custom and Conflict in Africa," since it proclaims the paradox that social cohesion is rooted in the conflicts between men's different allegiances, but is cut short before the explanation is reached that, for instance, there may often have been intermarriage between the members of two feuding families, with resulting ties of blood relationship which may pull together what the requirement of vengeance would seem to have torn irrevocably apart. The criminologist should be tempted by the extract on p. 490 to read more of Merton's "Social Theory and Social Structure" wherein he aims to discover how some social structures exert a definite pressure upon certain persons in the society to engage in non-conformist rather than conformist conduct. It is his central hypothesis that "aberrant behaviour may be regarded sociologically as a symptom of dissociation between culturally prescribed aspirations and socially structured avenues for realising these aspirations" (p. 491). In other words, a society is asking for trouble when, as in the U.S.A., it demands from its members more ambition to "succeed" than the vast majority can possibly

fulfil. From Piaget's "The Moral Judgment of the Child" is extracted an account of the "Internalisation of Social Control" (p. 115) which forms the most recent and authoritative corrective to theories of the origins of law in terms of express social contract or sovereign command. A convincing analogy is drawn between the evolution of rules of thought (laws of logic) and rules of behaviour in the developing experience of the child. The section on Status (p. 336) shows how this concept once referred only to *inherited* status, as in the terminology of Sir Henry Maine, but has now been broadened to encompass all culturally prescribed rights and duties inherent in social positions, whatever their origin.

The readiness of sociologists to modify and adapt their concepts—apparent on almost every page of this volume—may deserve some notice. "It is perhaps unnecessary," says Merton in note 5, on p. 554, "to reiterate the axiom that, despite the etymology of the term, *data* are not 'given' but are 'contrived' with the inevitable help of concepts . . . that one's concepts *do* determine the inclusion or exclusion of data." This does not mean that the sociologist uses concepts to create the raw material of his science. It means that he uses concepts to select from the raw material of experience the data relevant to his science. As his ideas of relevance change so he may modify his concepts, treating them always as tools of thought and of research. Is the jurist, too, as distinct from the judge or the legislator, similarly entitled to play fast and loose with his concepts?

In respect of *most* of them, most certainly not. This is not because jurisprudence, as Weber in the extract quoted on p. 212 maintains, is one of the sciences which seek to ascertain "the 'true' and 'valid' meanings associated with the objects of their investigation." It is because, in jurisprudence, most of the concepts are themselves the objects of investigation, the selected data. They are the concepts *of the law*—concepts employed by authoritative sources of law in the formulation of legal norms. These it is necessary to elucidate, with the aid of whatever techniques may have been developed by modern philosophical analysis, by an investigation of their current user at the hands of judges or other authorities whom judges may accept. But the concepts by virtue of which these concepts are included as data of jurisprudence—by virtue of which the selected data of jurisprudence are "contrived," and contrived so as to display an integrated system in terms of a general conceptual scheme—what of these? It is here where jurisprudence has a freedom and an opportunity of which it seems seldom conscious. The basic jurisprudential concept of law itself and its component concepts—as distinct from currently used concepts denoted by the same word or words—these submit to no authority of truth or user,—only to the test of fruitfulness for scientific purposes.

The point which has been made in the paragraph above needs

labouring, because failure to appreciate it can hinder cross-fertilisation between the sciences of sociology and jurisprudence. ". . . let it be repeated and continually kept in mind, that it is *only* the existence of the probability that, corresponding to a given subjective meaning complex, a certain type of action will take place, which constitutes the existence of the social relationship." This insight of Weber's, quoted at p. 80, has been fruitful for realist legal theory, as can be seen in the adoption by Holmes and Cardozo of a definition of law in terms of probability. That the concepts of law evolved by these jurists correspond to no previous user is quite irrelevant. They are impervious to the results of philosophical analysis. The criticism of Professor Hart in his inaugural lecture "Definition and Theory in Jurisprudence" in no way diminishes the possibility that they may prove an invaluable link between Jurisprudence and Sociology. And only by the constant search for such conceptual links can Jurisprudence hope to profit by both the theoretical work and the validated results of Sociology and to take its place eventually in a General Theory of Society.

B. E. King.

Principles of the Law of Contract. By J. F. Wilson, M.A., Lecturer in Law, University College of Wales, Aberystwyth. [London: Sweet & Maxwell, Ltd. 1957. xxxvi and 517 and (index) 12 pp. 35s. net.]

One might have thought that with textbooks such as Cheshire and Fifoot, Sutton and Shannon and Anson, the needs of the student for a textbook on the Law of Contract had been amply met. The subject is, however, one of deceptive simplicity, and Mr. Wilson has shown by his present work that there is still room for yet another textbook. It is a book that will be a valuable aid to any student of the subject.

As is inevitable, the great majority of his material is the traditional stuff, although he is not afraid to put forward his own original contributions, as for example at p. 107, when he is dealing with the argument that proof of an intention to deal exclusively with a third identifiable person is an essential requirement of operative mistake as to the person with whom one is dealing. It is a great merit of the book, however, that when he does mention an arguable point he deals with it by very fairly putting the arguments on the one side and the other, leaving it to the student to appreciate those arguments and to decide for himself, if necessary, what definitive attitude he himself might adopt. He does not attempt unnecessarily and unjustifiably to force his own views on his reader.

One other noteworthy quality of the book is the arrangement of the topics which have to be discussed. Mr. Wilson has given a

great deal of thought to this and has produced a result which seems not only logically sound but also well calculated to carry a student along through the subject sensibly, so that he is not expected to run before he can walk. A noteworthy example of this is his division of the so-called topic of mistake into two parts, unilateral mistake being properly connected with its related topics dealing with defective consent in the formation of a contract, while common mistake is treated along with frustration.

Further, he has a lively appreciation of those other portions of the subject which cause the ordinary student, and others, most difficulty. He has, therefore, paid particular attention to such matters as consideration and estoppel, severance and remoteness of damage. His treatment of mistake and these other topics alone would make the book worth reading.

The author's style is pleasant, fluent and concise. One noteworthy feature, which I fear the book may lose as it proceeds to further editions, is that the author has been severely economical in the use of references to cases. It is not that he fails to emphasise the importance of the study of cases in this subject, for his text on every page bears witness to the importance which he, like everyone else, places upon them: but he has not unnecessarily proliferated authorities. He has shown a nice judgment in his selection of authorities. In connection with the case-law it is to be noted that reference is made to the *All England Reports*, but not to the *Weekly Law Reports*.

The mention of further editions leads to the suggestion that when they are being considered one or two points might be borne in mind.

In the first place it might be possible to incorporate a more detailed definition of a contract early in the book, and to distinguish contractual from other obligations. It is true that the author at p. 14 defines a contract as a bilateral obligation based on the mutual consent of the parties. Is then marriage a contract?

Again in his section dealing with contracts needing certain formal requirements no mention is made of the Hire Purchase Act, 1938. Surely it should be dealt with there.

A more substantial point, perhaps, is that there is some weakness in the author's treatment of certain types of representations and promises. No mention is made of those so-called "collateral warranties" which feature in such a case as *Shanklin Pier, Ltd.* v. *Detel Products, Ltd.* [1951] 2 K.B. 854, which case together with cases following it can be a trap for the unwary. His treatment of the condition is unsatisfactory. Opinions may differ, but it would seem that the distinction between a promissory and a contingent condition (*cf.* Sutton and Shannon, 5th ed., at p. 284) is significant and worth making. Indeed, the author defines a condition (at p. 441) merely as a fundamental term of the contract, which raises the important issue as to whether there is a difference

between a condition and fundamental breach (*cf.* Sutton and Shannon, pp. 304–309).

Lastly, in treating of illegality, the author suggests by his arrangement of the subject that no new developments of public policy can be allowed. Is this quite certain?

This book is, however, in spite of these points a very sound piece of work, excellently produced and seems destined to be of great value to students.

KENNETH SCOTT.

Family Law. By E. L. JOHNSON, M.A., LL.B. (Cantab.), Solicitor of the Supreme Court, Lecturer in Law at King's College, Newcastle upon Tyne, in the University of Durham. [London: Sweet & Maxwell, Ltd. 1958. xl and 318 and (index) 7 pp. 35s. net.]

MR. JOHNSON opens with an entirely justified criticism of the type of university course in law which first introduces the student to English family law in a course on private international law. The student has been taught the family law of ancient Rome but frequently has no knowledge of that of modern England. The task of the lecturer on the English conflict rules is made easier now that the beginner can turn to Mr. Johnson's comparatively small but comprehensive and admirably lucid book. And in places where there is a course on English family law, the book is an excellent introduction and something more.

There is an Introduction giving a short historical background and a concise statement of the jurisdiction of the English courts. The book is then divided into four main parts: Preliminaries to Marriage; Legal Effects of Marriage; Termination of Marriage; Children. The part on Termination of Marriage does not provide a substitute for standard textbooks on divorce—obviously it could not do so in 73 pages—but it covers a remarkable amount of ground and includes a useful section on intestacy and family provision. The ordinary student will, of course, know something about some of the topics included in this general survey of family law. He will know about the contract to marry, though more in relation to infants than to adults. He will, though not in all places of learning, know about the wife's agency. He will certainly have been harassed by the artificialities of husband and wife in tort, and by the arguable rules about the deserted wife and the matrimonial home. He will have come across the tort of seduction. But about how to get married he will know even less than about how to get unmarried, and his ignorance of such matters as legitimacy and illegitimacy, maintenance of children, adoption and guardianship will be abysmal in all systems that do not include a course on family law. The great value of Mr. Johnson's book is that it fits

the familiar material into the general framework of family law, and presents a logical whole which does indeed show (as he had hoped) the recent developments of English family law and their place within the general structure of our law.

Much thought has gone into the production of this book. There is a most proper use of footnotes, so that the reader can go not only to statute and case but, conveniently and expeditiously, to textbook and periodical literature for amplification of the necessarily concise statements in the text. Mr. Johnson's statement of policy is welcome: "In doubtful cases I have sometimes indicated what I consider to be the correct solution, though I hope I have shown clearly the possible alternatives. On controversial matters my own suggestions may not meet with universal approval, but that is of little moment provided that the existence and nature of the difficulty is clearly apprehended. On such matters dogmatism has been avoided, for nothing is gained by pretending that the scope of a rule is clear when in fact the position is otherwise." He has certainly adhered to this policy. There are other textbook writers who might well do likewise.

F. J. Odgers.

The Danish Criminal Code. With an Introduction by Dr. Knud Waaben, Professor A.I. in the University of Copenhagen. [Copenhagen: G. E. C. Gad. 1958. 119 pp. D.cr. 20 net.]

This English translation of the Danish Criminal Code of 1930 is of particular interest to English criminalists, now that it really seems that the time is not far distant when the reform of some parts, at any rate, of our criminal law will be undertaken.

The Code of 305 sections is divided into a General Part of 97 sections and a Special Part of 208 sections. To the English mind, the Code seems overburdened with procedural detail, which is sometimes minute, *e.g.*, as to the diet of convicts, and the circumstances in which they can be handcuffed. By contrast some of the substantive provisions are very vague. Homicide in general is disposed of in less than three lines in section 237, and three special cases are succinctly dealt with in the next three sections.

The General Part, except for twelve sections, is concerned with venue and the various kinds of punishment that can be imposed. It covers thirty-seven printed pages, of which only three are devoted to substantive law. In these three pages sections 13 to 24 are disposed of. They deal with self-defence, infancy, insanity, intoxication, as defences, and with attempts and accomplices. It is noteworthy that children under the age of fifteen are not punishable (s. 15), and that, as regards children between the ages of fifteen and eighteen, the public prosecutor has power to stay proceedings (s. 30).

In the Special Part, the most striking feature is the importance attached to *mens rea*. In the introduction (p. 9), it is mentioned that absolute liability is little known. Some examples may be given of the attention paid to the state of mind of the accused. There is often an express provision that the sentence shall be less severe in hard cases, *e.g.*, the forger who has used a false document to promote a lawful claim cannot be imprisoned for more than one year (s. 172 (2)). Again, imprisonment is the usual penalty for putting counterfeit coin into circulation, but if the accused received the coin in good faith, the penalty may be reduced to simple detention or fine (ss. 167, 168). Further, under section 22, one charged with attempt, who is proved to have desisted spontaneously, is not punishable. The distinction between intention and negligence is clearly demarcated. A number of crimes that in England require intention are punishable in Denmark if committed through negligence, but the punishment prescribed is invariably modified. Instances of this are coining, perjury and receiving. Intentional putting into circulation of false coin is dealt with in section 167, and recklessly doing so in section 168. Intentionally giving false evidence is punishable, if material, with not less than three months' imprisonment, with a maximum of eight years (s. 158), but doing so with gross negligence is punishable with fine or simple detention (s. 160). In law simple detention may extend to two years (s. 44 (1)), but in practice rarely exceeds two months (Introduction, p. 16). Intentionally receiving stolen property is dealt with in section 284, and doing so with gross negligence in section 303. The latter provision is especially valuable. It is found in England that intentional receiving is hard to prove, despite the assistance of relaxations of the general rules of evidence in section 43, Larceny Act, 1916. Yet there is no better discouragement to criminal offences against property than to imprison the "fences." Under section 303, a person convicted a second time of grossly negligent receiving may be sentenced to imprisonment.

Of the borderline crimes, attempted suicide is not punishable. Homosexuality between consenting adults of full mental capacity, and not in a position of dependence one toward another, is not criminal, unless payment is accepted (s. 230). Denmark is noted for its progressive approach to the question of legalising abortion: Glanville Williams, *The Sanctity of Life*, 222–223. The only section in the Code dealing with abortion makes the sale of abortifacients criminal, except to medical practitioners and hospitals (s. 243). Bigamy and incest are both crimes (ss. 208, 210). In section 165 is an offence not unlike that of public mischief of the *R.* v. *Manley* type. English law is remarkable alike for the absence of any general right to privacy, and of any general duty to rescue. Both these matters are dealt with in the Code. Section 263 protects some forms of privacy, and in section 264 some forms of trespass are made criminal with a similar purpose. Section 253 imposes a

duty to rescue. A provision which would seem to be needed in England is section 234 (3), which extends the law of obscenity to make criminal the publication or sale of pictures solely intended to exploit sensuality commercially.

Two interesting forms of punishment may be inflicted under the Code. Under section 236 (1) certain sexual or homosexual offenders may be prohibited from appearing in public parks, bathing places, and in the neighbourhood of schools and mental hospitals. This may be difficult of enforcement, but at any rate enables the police to force such offenders to "move on," and is a welcome attempt to cope with the serious problem of protecting young persons from interference. Under some sections, *e.g.*, section 195, 207, the court has power to deprive the accused of the right to carry on certain trades, for offences against the law governing the sale of food, and for unauthorised gambling.

The quality of the English in the introduction and in the translation of the Code is high enough for the meaning to be reasonably plain to an English reader, but some inaccuracies and infelicities were noticed, and have been communicated to the author.

R. N. Gooderson.

Carver's Carriage of Goods by Sea. Tenth edition, by Raoul P. Colinvaux. [London: Stevens & Sons, Ltd. 1957. cxv, 1088 and (index) 69 pp. 130s. net.]

This is the second edition undertaken by Mr. Colinvaux, who was responsible for the extensive overhaul effected in the previous (ninth) edition. Any who had occasion to make use of the previous edition will be grateful to find that this classic work remains under the same direction. It is not often that one is thus privileged to encounter in readable form such a combination of scholarship and practical knowledge.

Since the war, one feature of the export trade has been the revival of contract on f.o.b. terms. While such agreements for the sale of goods are not strictly contracts for the carriage of goods by sea, they necessarily envisage contracts of affreightment and are intimately bound up with the subject of this book. It is remarkable that the standard textbooks devote so little attention to the f.o.b. contract. Of the new material in this edition not the least valuable is the discussion of this now flexible instrument of commerce. This will be found at pp. 724–733, and represents a most helpful collection and analysis of the authorities in summary form.

In a work running to over one thousand pages the reviewer is bound to meet items which he finds difficult to accept. In the present case these occur chiefly in relation to the discussion (at pp. 162–165) of the words "loss or damage" which occur frequently throughout the Hague Rules. At p. 163 it is claimed that the French text of the Brussels Convention demonstrates an intention

to restrict those words in Article IV, r. 5, to loss *of* or damage *to* goods. The text as quoted (which contains two misprints) is *pertes ou dommages causés aux marchandises*. But in the Convention itself these words are immediately followed by the phrase *ou les concernant*, which surely has been accurately rendered in the English version as "or in connection with goods." The comment in regard to the Convention is thus unfounded. On the same page the reference at line 21 should be to Article IV, not Article II. On the page following, at line 19, the vital word "not" has been omitted. At p. 165 mention is made of *Dreyfus* v. *Tempus Shipping Co.* [1931] A.C. 726, as being a claim against shipowners for general average contribution, to which Rule D of the York-Antwerp Rules applied. In point of fact it was a claim *by* shipowners for contribution, and Rule D arose by way of defence to counterclaim.

The recent decision of Devlin J. in *St. John Shipping Corporation* v. *Rank* [1957] 1 Q.B. 267, has inspired a completely new appendix on "Illegal Performance of Contract." This could be read with profit by all interested in the basic principles of the law of contract. The learned editor's conclusion, derived from a consideration of the authorities (and particularly from nineteenth-century marine insurance cases), is interesting. An infringement of the law not contemplated by the contract in its performance does not, he says, affect the enforceability of the contract unless having regard to its subject-matter as performed it was expressly or by implication forbidden by law; and even then the contract remains enforceable by a party not privy to the infringement. It is pointed out that in the case last mentioned there appears to have been nothing to show that the shipowners were privy to the overloading of their vessel, and if the above conclusion be right, absence of privity on their part would on any view have entitled them to succeed. And that case ought not, it may be suggested, to be regarded as authority for the view that a shipowner who overloads his vessel contrary to the Merchant Shipping (Safety and Load Line Conventions) Act, 1932, may always recover full freight on the entire quantity loaded. Certainly he cannot if the contract deliberately envisaged the illegal overloading. Even if it did not, a shipowner who agrees with a charterer to carry not less than a stated minimum tonnage in a vessel to be named and placed solely at the charterer's disposal, and who knowingly nominates a vessel for this purpose in which it would be illegal to carry that tonnage on the contemplated voyage, would on principle appear to be precluded from recovering any freight. A charterparty is a contract for the loading, carriage and delivery of goods. If the loading of that tonnage alone would have contravened the statute, it is submitted that the contract as performed was *pro tanto* illegal and unenforceable by the shipowner (*cf. per* Devlin J. at p. 287, *ibid.*). If, as in the case cited, no overloading took place until, the cargo having been loaded, the vessel necessarily bunkered or took in stores for

the voyage, it seems at least arguable that the contract as performed constituted a knowing infringement of the law by the shipowner. Moreover, the claim being made under a charterparty the difficulties which arise where the party resisting the claim was a bill of lading holder receiving only a small parcel of the full cargo would largely disappear. To a claim for freight it could be answered with force that some part of the sum claimed must be referable to the overloading. But for the commission of a crime on his part the shipowner could not have begun to claim the amount of freight at stake. *A fortiori* if the cargo was loaded after bunkering, etc. There remains an argument based upon the wording of section 44 of the Act, which Devlin J. (see pp. 290, 291) refused to decide. Subject to this, on principle it is difficult to surmount the plea of illegality.

The appendix mentioned is a most useful contribution to a difficult topic. Throughout the book, indeed, the nimble mind of its editor is in evidence. The result is a textbook of model clarity and incisiveness.

Since this edition went to press, the meaning of the phrase "weather working day" has been further elucidated, namely, by Pearson J. in *Compania Naviera Azuero* v. *British Oil & Cake Mills, Ltd.* [1957] 2 Q.B. 293. The decision makes necessary some amplification of the discussion of this expression at pp. 838, 839. The same case (though reported on this point only in *Lloyd's List Reports* [1957] 1 Ll.L.R. 312) also furnishes support for the view expressed at pp. 843, 844 concerning the computation of laytime where cargo is to be discharged at an average rate and there is more than one port of discharge.

This is a fine book. No one concerned with the practice or teaching of this branch of the law can afford to be without it.

R. A. MacCrindle.

Some Comparative Aspects of Irish Law. By A. G. Donaldson, ph.d. [Duke University Press, Durham, N.C., and London: Cambridge University Press. 1957. xii, 282 and (index) 11 pp. $6 or £2 5s. net.]

Dr. Donaldson's work, which is Number 3 in the series of publications on the British Commonwealth, by the Duke University Commonwealth-Studies Centre, is heartily to be welcomed, for works on Irish law are all too rare. A study making comparisons between the law of Ireland and that of other common law countries is unique. Three of the six chapters are based on lectures delivered by Dr. Donaldson at Duke University in 1955.

Dr. Donaldson deals mainly with public law (constitutional law; administrative law and international law) although there are also chapters on legal and constitutional history, and on land law. Conflict of laws is touched upon briefly. Other branches of Irish

law, such as criminal law, would no doubt provide almost equally fruitful material for comparative study. As it is, however, one might almost criticise the author for endeavouring to cover too wide a field in the space of less than three hundred pages, if he were not at pains to point out his limited object, which is to suggest possible fields for comparative research, to indicate some of the problems involved and the materials available for their solution, and to draw some general conclusions.

Irish law has much appeal for the comparative lawyer. The establishment of the Irish Free State (now the Republic of Ireland) has had a catalytic effect upon the law of the Commonwealth and of Dominion Status. Much of this will, of course, not be new to readers of Professor Wheare's *The Statute of Westminster and Dominion Status*. Less well known perhaps is the influence which the Irish Constitution of 1937 has had on the Constitutions of the newer Dominions, such as India and Pakistan, and even on countries outside the Commonwealth, such as Burma. Dr. Donaldson discusses this topic learnedly and in some detail. One aspect not mentioned by him is that Article 29 of the Irish Constitution on International Relations has been reproduced almost verbatim as Chapter XII of the Burmese Constitution. Burmese courts in considering this chapter may well turn for guidance to the jurisprudence of Irish courts where these identical provisions have been interpreted, as in *Saorstat and Continental Steamship Co., Ltd.* v. *De Las Morenas* (1945) Ir.R. 291, and *Zarine* v. *Owners of s.s. Ramava* (1942) Ir.R. 148.

Irish legal and constitutional history provides an example of one way in which the common law has supplanted a native legal system and reproduced on alien soil the English model, with some startling and interesting variations added to it. So long as a considerable number of Irish people felt themselves subject to a foreign legal system, so long the common law in Ireland, lacking wholehearted public acceptance, was precariously based. At the time of the Repeal agitation in the 1840's illegal "Repeal Courts" tried to oust the jurisdiction of the established common law courts; and during the Anglo-Irish War the illegal Dáil Éireann in 1919 set up courts of arbitration known as "Dáil Courts" which in many parts of the country so successfully replaced the lawful courts that they were even resorted to by Unionist landlords to settle disputes with their Nationalist tenants. The law applied by these "courts" was according to their *Code of Rules*:

"The law as recognised on January 21, 1919 . . . except such portion thereof as was clearly motived by religious or political animosity. . . . Without prejudice to the foregoing, pending the enactment of a Code by the Dáil, citations may be made to the court from the early Irish Law Codes, or any commentary upon them in so far as they may be applicable to modern conditions, and from the Code Napoleon, or other codes, the Corpus Juris

Civilis, or works embodying or commenting on Roman law; but such citations shall not be of binding authority. Save as aforesaid, no legal textbook published in Great Britain shall be cited to any court." (Dr. Donaldson's summary of this paragraph, at p. 22 of his book, is not wholly accurate.)

In spite of this initial antipathy to the common law, Irish legal and constitutional development has tended to revert to the pattern existing in the United Kingdom, and such innovations as "extern ministers" and the "Initiative" have been discarded.

Irish land law is also of interest, for not only have certain topics, such as easements, been very fully discussed by Irish courts, but also some features of it are almost peculiarly Irish, such as conacre, rundale, perpetually renewable leaseholds, and "toties quoties" leases.

The Irish system of Registration of Title resembles the Torrens system, as Dr. Donaldson points out. This is not surprising since Sir Robert Torrens was charged with the preparation of the Record of Title (Ireland) Act, 1865, later replaced by the Local Registration of Title (Ireland) Act, 1891.

Dr. Donaldson's book may, of course, be criticised upon certain details, for example pp. 119–121, which deal with the system of "backing of warrants" issued in Ireland for execution in Britain and vice versa. This system originated before the nineteenth century (see the judgment of Day J. in *R.* v. *Mr. Justice Johnson*, 29 How.St.Tr. and 8 Geo. 1, c. 9 (Ir.)). Statutory authority for it in the nineteenth century included the Indictable Offences Act, 1848, and the earlier statute 44 Geo. 3, c. 92, apart from the Petty Sessions (Ireland) Act, 1851, referred to by Dr. Donaldson. It is also too absolute to say that in *R.* v. *Commissioner of Police, ex p. Nalder* [1948] 1 K.B. 251 it was "held that the Fugitive Offenders Act, 1881, did not apply between England and the Republic . . ."; for Lord Goddard C.J. said expressly (at p. 256): "It is not necessary to express any opinion whether that Act can apply at all between England and Ireland, though the strong inclination of my opinion is that it cannot."

In the discussion of Irish legal history there is perhaps insufficient attention given to the Penal Laws and their impact upon the substantive law still enforced in Ireland, *e.g.*, on the law of charities, and to the Irish system of registration of deeds, under 6 Anne c. 2 (Ir.), which, as has been pointed out by Professor Brougham Leech, was passed as an auxiliary to the Penal Laws.

Reference might also have been included, in the discussion of precedent, to F. E. Dowrick's note "Precedents in Modern Irish Law," (1953) 69 L.Q.R. pp. 25–29; in the discussion of the interaction of Irish and Australian land law, to Sir Charles Gavan Duffy's *The Land Law of Victoria (Australia)*, Dublin, 1862; and in the discussion of the Dáil courts, to H. Hanna's *The Statute Law of the Irish Free State*, Dublin, 1929, and L. Ua Cadhain's *The Law Courts in Eire*, Dublin, 1943.

This is a pioneering work of great merit. It reveals the skill of the author as well as the extent of the field of comparative study in Irish law. It is earnestly to be hoped that Dr. Donaldson will continue to explore the field with further studies of a more detailed kind, and that he will inspire others to follow in his footsteps.

PAUL O'HIGGINS.

The Uses of Argument. By S. E. TOULMIN, Professor of Philosophy, University of Leeds. [Cambridge: at the University Press. 1958. vii, 261 and (index) 2 pp. 22s. 6d. net.]

PROFESSOR TOULMIN proposes that logicians should model their science on the analogy of jurisprudence. The point of the analogy (developed on pp. 7–8, 15–17, 41–43, 95–96, 141–143 of this compulsively fluent book) is that arguments, like lawsuits, are of many different kinds, and that logicians have, under the spell of mathematics, allowed themselves to concentrate exclusively on just one, quite untypical, kind, namely, on elementary knock-down formal deductions like the syllogism. Professor Toulmin's criticism of this exclusiveness is twofold: that it has given currency to a dichotomy—"deductive" versus "inductive"—which is misconceived and philosophically disastrous; and that the resulting working categories of current logical theory are quite inadequate for the practical business of assessing real-life arguments.

Both these criticisms are of closest relevance to jurisprudence. For, in the first place, the dispute between an "empirical" and an "*a priori*" method in jurisprudence is framed precisely in terms of the inductive-deductive dichotomy, so that if Professor Toulmin is right this whole approach to the problem of method will have to be re-examined.

The second criticism is developed (and illustrated with some simple examples of a legal flavour) in the chapter on "The Layout of Arguments." Here, for example, he points out that a logical apparatus that cannot handle a *principle* ("lying is reprehensible") without first assimilating it to an assertion ("all lying is reprehensible"), cannot treat a conflict of principles as anything more subtle than a simple contradiction. Again, he contrasts the traditional "premises, therefore conclusion" analysis of arguments with his own more complex scheme, which sees in an argument a *claim* made on the basis of certain *data* in virtue of a *warrant* or principle, which in turn must have some *backing*, and which may justify the inference only presumptively, *i.e.*, subject to *rebuttal* under certain conditions.

It seems to me that Professor Toulmin has safely made his point here that current logical theory is not an adequate framework for the analysis of legal arguments. The life of the law is logic, but only provided "logic" is understood in more generous terms than

the syllogism and its like. This book itself hardly provides an alternative, but it could do so at second remove if a professional logician could overcome his irritation with its wilder polemics and develop its suggestions.

T. J. Smiley.

Problems of Legal Philosophy. By Frede Castberg, Professor of Constitutional and International Law at the University of Oslo; Rector of the University. [Oslo University Press, and London: Allen & Unwin, Ltd. 1957. ii, 114 and (index) 6 pp. 16s. net.]

The book opens with explanations as to certain types of study. The kind of legal science that is apparently popular in Scandinavian countries is what the author calls "dogmatics." This is the knowledge and application of a number of positively given postulates according to certain given directions (pp. 1–7). It is also a valuing science in the sense that it must answer the question: right or wrong? It is most important, in the author's opinion, that the postulates should be rational and just (p. 6). It is in the process of application that legal dogmatics is said to differ from legal history and sociology. Dogmatics give directions, the other two give facts, however much the selection and evaluation of these may be coloured by the predilections of the narrator. Then comes a rather questionable distinction between history and sociology: history is not concerned with the "laws of history" as natural sciences are concerned with the "laws of nature," but with single, individual facts; sociology is a causal science which traces regular connections between social causes and effects. This, it is submitted with respect, seems to be a misrepresentation of the historical method. Moreover, the statement suggests an obvious parallel between sociology and the natural sciences which passes unmentioned. Sociology is distinguished from dogmatics on the ground that the latter study "has objective law for its domain . . . the contents of which it explains and itself further develops in applications to imagined or really occurring cases" (p. 11). It is not clear what "explains" means. May not the explanation of the law sometimes require tracing out the causal connection between social, historical and other causes and their effects? Sociology is further distinguished from dogmatics on the ground that it is "non-valuing" in the sense that it "wishes to explain legal life—not to judge it" (pp. 13–14). The word "explain" here seems to bear a different meaning. In any case, to say that sociology is not concerned with passing judgments is unacceptable. Up to a point we see what the author is getting at, but the arbitrary distinctions which he seeks to draw do not bear any relation to what actually happens in these branches of study. The author comes finally to the

philosophy of law, which is concerned neither with the application nor with causal explanations but with the notion of "law" itself, the character of legal thought and the contents of "right law." The rest of the book is devoted to these three topics in that order.

The problem of law is prefaced with some "remarks on the thought-activity by which the notion of law is determined" (pp. 21–24). Is the notion of law given *a priori* or derived empirically? By *a priori* is meant that the notion is not formed by observing outer reality, but by creating it in our minds independent of experience and in the light of which we meet experience. In his opinion the notion of law contains both *a priori* and empirically derived elements. "The task of determining the notion of law resembles the task of determining a notion of reality in that the point of departure must be taken in individual phenomena in the world of reality." This point of departure is "the *a priori* assumption that the fundamental rules of the legal system are 'binding'" (pp. 21–23). Certain observations must be made on all this. In the first place, the terms "fundamental" and "legal system" are not explained. Secondly, the term "legal system" makes the notion of law already implicit in the point of departure. Thirdly, for most purposes it is sufficient to start with a rough assumption as to what law is and refine it later; and with this the author seems to agree when he says that "the determination of the notion of law first demands a generalising survey" (p. 23). It implies that we have already some general idea of what we are to survey. His own generalisation, however, is unhelpful since it complicates matters by introducing the highly controversial element of "bindingness." If, on the other hand, we desire to start at rock bottom, the obvious point of departure would surely be the actual uses of the word "law": after examining these we can then shape, prune and classify our ideas as we choose. Fourthly, it is not clear whether the author treats "bindingness" and "validity" as synonymous or not (see pp. 23, 44).

After a discussion of normativity the author comes down in favour of the normative conception of law but with a foundation in social reality (pp. 36–37). The attacks on the normative conception of law by Hägerström, Lundstedt, Olivecrona, Astrup Hoel and Ross are considered and rejected. It should be mentioned, perhaps, that the views of these writers are dealt with in just under four pages, and one wonders whether full account has been taken of what they actually said. On the question of the "existence" of law, the author properly rejects the theory that it consists in the sum total of the consciousness of individuals. Instead he explains it as existence apart from our awareness of it: thus, a solution to a problem "exists" although we may not find it (p. 42).

The characterising of binding rules as "valid" brings the author face to face with Kelsen and his *Grundnorm*. Kelsen, it is said,

failed to provide a complete picture, but he seems to have missed Kelsen's point. Suppose the courts override the law, even though it has been created according to the constitution: why should we not accept the courts rather than the constitution? The answer is that we must adopt that which " agrees with the greatest number of acts by individuals, with the most widespread and strongest conviction of law and with the existing social distribution of power " (p. 46). Surely, Kelsen said precisely this when he required a " minimum of effectiveness " for the *Grundnorm* (see his *General Theory of Law and State*, pp. 118–122).

The remaining two sections of the book deal with problems of legal thinking and valuation. Both suffer from superficiality in treatment and there is little that is new. That on legal thought opens with the observation that it is necessary for social life that particular instances are brought within the general normative statement. This kind of reasoning is said to be fundamental (p. 54). In making the subsumption certain elements of the particular instance are treated as irrelevant, others as determinant. (This is none other than Professor Goodhart's " selection of material facts.") Although logic is necessary to the application of law it suffers from the drawback that normative statements operate with fluid notions, and this very fluidity imports an element of choice when subsuming the special case under a general rule. The author rejects the extreme conclusion that the logical form is but a mask for individual caprice. While admitting that in certain cases a choice has to be made, he thinks that " this does not prevent many of the operations of the mind in legal thinking appearing just as certain to us as our most certain conclusions concerning relation between facts " (p. 67). The discussion, however, is too scanty, and one sometimes wonders if he minimises the situations where a choice has to be made.

Legal thought may be given " lines of direction " according to social purpose and justice. The latter is subdivided into formal justice, which is only the demand that the special case should be decided in accordance with the existing general norm, and material justice, the chief feature of which is the distribution of legal benefits and evils according to merit and guilt (p. 74). There may be a conflict between purpose and material justice, but there is no discussion. One point of interest does emerge. The idea of material justice imports the assumption of free will. It is the writer's firm thesis that " one cannot reproach a person for anything as guilt or give him credit for anything as merit, without assuming that this person might have comported himself otherwise than he did " (p. 94). But causality in social life cannot be disregarded. The problem, therefore, is to reconcile the principle of free will with that of causality. This is accomplished as follows. Freedom of will operates within the framework of the regularity of nature. Every decision is influenced by motives. The motives in favour of

a particular decision may be so strong as to preclude the possibility of a contrary decision: but when the motives conflict and the psychological pressures are equal, freedom of will has full rein. "Between these two extremities lies a sliding scale of motive situations with a corresponding sliding scale in the real freedom of will" (p. 105). It would have been interesting to see how this idea would have worked out, especially in the complex turmoil of industry; unfortunately, there is no discussion.

Quite a number of interesting points have been raised in the book. It is a pity that they are insufficiently developed. They are mostly of a controversial nature and their acceptance or rejection must remain in abeyance until a fuller discussion is forthcoming.

R. W. M. Dias.

The Frederic William Maitland Reader. By V. T. H. Delany, The Queen's University of Belfast. *The Alexander Hamilton Reader.* By M. E. Hall. Docket Series, Nos. 10 and 9. [Oceana Publications, New York City; London: Sweet & Maxwell, Ltd. 1957. In paper wrappers 8s. net; bound 27s. net.]

On first reviewing these books, one's immediate reaction was that it was bound to happen. In so many spheres, predigested wisdom and knowledge, selected saws and sayings, significant snippets and extracts are all that an ordinary person can apparently be expected to cope with. Why should lawyers be considered exempt from this development?

These two volumes are, however, rather superior examples of the type of publication which has been developed to meet that situation. Not that this is true of the form in which they are presented! In their paper-wrapper form, the paper wrappers are peculiarly unattractive, and, whereas I can recognise Alexander Hamilton on his Reader, I cannot see what connection the figure on volume 10 has with Maitland. The paper is rather coarse, the margins small and the printing legible.

Leaving aside such matters, however, the material presented is an interesting selection, intelligently and industriously done. In the Maitland volume, the editor starts with six personal impressions by people who knew Maitland (including Professor Hollond's address to the Selden Society in 1953). They have all been in print before but it is good to have them together. Then he proceeds with 136 pages of extracts from Maitland's work, a selection done judiciously and designed to give a reader a very fair grasp of the scope and quality of Maitland's thought. Selections from his letters, comments on him by Vinogradoff, Plucknett, H. A. L. Fisher and A. L. Smith follow. Then you have selected

epigrams and an extremely good bibliography including a list of reviews of his works and a further one of biographical and other notices of him.

The Hamilton Reader follows the same pattern.

Generally the material in these publications belies their appearance. The editors have done their work well and it is a pity that it is not presented in a more attractive way.

KENNETH SCOTT.

The Law Quarterly Review: Index to Volumes 1–72. By PETER ALLSOP, M.A. [London: Stevens & Sons, Ltd. 1957. xii and 326 pp. 42s. net.]

ATTENTION should be called to this New Index to the *Law Quarterly Review*. The previous index, by Mr. T. A. Blanco-White, for Volumes 1–64, was published in 1949, and was then warmly welcomed. Its scheme was settled in consultation with Mr. R. E. Megarry. The present edition is much revised. The method now used is that common to encyclopedic legal textbooks. Whilst this method has evident advantages, the academic lawyer may nevertheless occasionally regret the abandonment of the previous method of classification. The present edition is, however, a most workmanlike production. The main part of the Index is by way of subject headings, but there is also an alphabetical list of authors of articles and of cases specially noted or discussed, and a chronological table of those statutes which have been the subject of particular comment. Mr. Allsop has also furnished a Table of Initials of those authors who thus identified their contributions: it is an interesting and helpful addition. An index of this kind greatly enhances the utility of the *Law Quarterly Review*, a repository of much legal learning, and its author deserves the thanks of the profession for undertaking it.

C. J. H.

The Advocate's Devil. By C. P. HARVEY, Q.C. [London: Stevens & Sons, Ltd. 1958. vi and 166 pp. 12s. 6d. net.]

THIS is a provocative and very readable little book. It seems that the advocate's main devils are the judges and the common law. The case against the former is presented with a wealth of anecdote, that is usually, apart from one memorable exception, cloaked with decent anonymity, and there is excellent material for the student of Digestive Jurisprudence. The chapter on the Common Law is marred by the extraordinary suggestion that the undue reverence paid to the common law originates in the academic teaching of legal history.

The style is racy though at times clumsy, and punctuation is, on occasion, as absent as in a legal draft.

R. N. GOODERSON.

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